No. 86-358

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants

v.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
Appellees

On Appeal from the Supreme Court of Arkansas

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether an Arkansas highway use tax statute discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution because it imposes on trucks registered outside the State an effective tax rate over 300% of the rate paid by trucks registered in the State.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

Appellants are certified plaintiff classes consisting of all motor carriers whose vehicles are "subject to the Highway Use Equalization Tax embodied in Act 685 of 1983," in addition to the following named plaintiffs:

Appellant American Trucking Associations, Inc. (ATA), is an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Appellant Arkansas Motor Carriers Association, Inc., formerly the Arkansas Bus & Truck Association, Inc., is an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Appellant Leon Cawood is a sole proprietor doing business as Leon Cawood Trucking.

Appellant Commercial Carriers Inc., is a wholly owned subsidiary of Ryder Commercial Transport, Inc., which is in turn a wholly owned subsidiary of Ryder System, Inc. Commercial Carriers' affiliates or subsidiaries (other than wholly owned subsidiaries) are Automotive Railhandling Inc.; B & C Inc.; Blazer Truck Lines, Inc.; Carrier Support, Inc.; Complete Auto Transit, Inc.; Delevan Industries, Inc.; F. J. Boutell Driveaway Co., Inc.; Fleet Carrier Corporation; Fleet Carrier Dealer Services, Inc.; Janesville Auto Transportation Company; M & G Convoy, Inc.; Murray Sandblast & Paint, Inc.; National Trucking Company; Ryder Energy Distribution Corporation; Ryder Truck Rental, Inc.; Summit Industries, Inc.; and Transport Support, Inc.

Appellant Diamond Transportation System, Inc., is an independent corporation whose subsidiaries and affiliates (other than wholly-owned subsidiaries) are Fox Transportation, Inc.; Sed. Air, Inc.; and Snicknej Co.

Appellant Joe Fortenberry is a sole proprietor doing business as Fernwood Transportation.

Appellant Jones Truck Lines, Inc., which has no affiliates or subsidiaries that are not wholly owned, is a subsidiary of Sun Carriers, Inc.

Appellant Rollins Leasing Corporation is a subsidiary of R.L.C. Corporation. Rollins' affiliates or subsidiaries (other than wholly owned subsidiaries) are Cobel Systems, Inc.; Rollins Dedicated Carriage Services, Inc.; and Rollins-Matlack Administrative Services, Inc.

Appellant Transcon Lines, which has no affiliates or subsidiaries that are not wholly owned, is a subsidiary of Transcon, Inc.

Appellees are the following defendant state officials, or their successors: Henry C. Gray, Director, Arkansas Highway and Transportation Department; Dalton Farmer, Ron Herrod, Patsy Lee Thomasson, Robert Pritchett, Jr., and Bobby Hopper, members of the Arkansas State Highway Commission; John Bailey, Chief of the Arkansas Highway Police Division of the Arkansas Highway and Transportation Department; Charles D. Ragland, Commissioner of Revenues, Revenue Division, Arkansas Department of Finance and Administration; Jimmi Lou Fisher, Treasurer of the State of Arkansas; and Mahlon Martin, Director, Arkansas Department of Finance and Administration.

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On Appeal from the Supreme Court of Arkansas

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas (J.S. App. A) is reported at 288 Ark. 488, 707 S.W.2d 759. The supplemental opinion of the Supreme Court of Arkansas on denial of rehearing (J.S. App. B) is reported at 288 Ark. 506-A, 709 S.W.2d 410. The opinion of the Supreme Court of Arkansas on a prior appeal (J.S. App. D) is reported at 280 Ark. 258, 657 S.W.2d 207. The opinions of the Chancery Court of Pulaski County (J.S. Apps. D and F) are unreported.

JURISDICTION

The opinion of the Supreme Court of Arkansas was rendered on April 14, 1986. A petition for rehearing was denied on May 27, 1986 (J.S. App. C). A notice of appeal to this Court was filed on June 17, 1986 (J.S. App. G). On August 15, 1986, Justice Blackmun granted an ex-

tension of time to docket the appeal to and including September 3, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves a challenge to the validity of a state statute under the Commerce Clause of the United States Constitution. The relevant Arkansas statutory provisions are reprinted in J.S. App. H.

STATEMENT

At issue in this case is the constitutionality of the Arkansas Highway Use Equalization (HUE) tax under the Commerce Clause of the United States Constitution. Even though the Arkansas HUE statute taxes trucks registered outside Arkansas at an effective rate over 300% of the rate for trucks registered in Arkansas, and notwithstanding a dissent recognizing that "[d]iscriminatory, parochial legislation such as this interferes with interstate commerce" and thus "violates the commerce clause of the United States Constitution" (J.S. App. 18a, 19a (Hickman, J., dissenting)), the Supreme Court of Arkansas upheld the statute against federal constitutional challenge.

A. The Nature and Operation of the Arkansas HUE Tax.

In recent years, Arkansas has conditioned motor carriers' use of its highways on payment of two major taxes: annual truck registration fees for Arkansas-based trucks (ranging up to $1,044 per truck) and fuel taxes. See Ark. Stat. Ann. §§ 75-201(c)(7) (Supp. 1985); 75-1106, 75-1150, 75-1241, 75-1251, 75-1269 (Repl. 1979); 75-1278 (Supp. 1985). In 1983, the State enacted a statute imposing a third substantial tax, the HUE tax, on trucks carrying a gross cargo weight between 73,280 and 80,000 pounds. See Ark. Stat. Ann.

§§ 75-817.2, 75-817.3(a)(3), (4), and (5) (Supp. 1985). A truck operator may satisfy its HUE tax obligation by paying either an annual flat tax of $175 for each truck that uses the State's highways or a tax equal to 5¢ per mile for every mile the truck traveled in Arkansas during the previous registration year. Ark. Stat. Ann. § 75-817.3(f),(i) (Supp. 1985).[1] The purpose of the HUE tax is to raise revenue to finance highway maintenance necessitated by the operation of heavy trucks (see J.S. App. 15a). The tax raises approximately $28 million annually from motor carriers throughout the United States.

On its face, the HUE tax applies to both in-state and out-of-state trucks. In its practical operation, however, as shown by the extensive statistical evidence introduced at trial by both appellants and appellees,[2] the tax discriminates heavily against interstate motor carriers whose trucks are registered outside Arkansas.

The structure of the HUE tax is such that it is always advantageous for operators of trucks traveling more than 3,500 miles per year on Arkansas' highways to select the flat $175 tax. At that mileage level, the tax per mile ($175 divided by 3,500) is exactly equal to the alternative 5¢ per mile charge; as a consequence, operations in excess of 3,500 miles per year incur no additional tax cost. On the other hand, the 5¢ per mile tax is always preferable for trucks that travel fewer than

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[1] The statute also allows a truck operator to purchase a trip permit of $8.00 per hundred miles driven in Arkansas. Ark. Stat. Ann. § 75-817.3(i) (Supp. 1985). Relatively few operators choose this option, and it is not material to the resolution of this case.

[2] This evidence included the results of an exhaustive survey conducted by appellant ATA (see PX 8-11, 41-42, 45-46, 51, 64; Abstract of Record 302-319) and a similar study by appellees that in substance corroborated the principal findings of the ATA survey (see PX 38-40; Abstract of Record 184-187, 195-199).

3,500 miles annually in Arkansas, because the total tax paid amounts to less than $175 per truck.

The evidence at trial showed that the average Arkansas-registered truck travels far more than 3,500 miles per year in Arkansas: 19,386 miles per year, according to appellants' data (PX 46), and 17,770 miles per year, according to appellees' study (PX 38). Not surprisingly, therefore, operators of virtually all (98.4%) Arkansas-based trucks elect to pay the flat $175 tax (PX 38, 51). Because of these trucks' heavy in-state mileage, their average HUE tax cost, by appellees' own figures, is only 1¢ per mile (PX 38, 51).

In contrast, the undisputed evidence showed that the average non-Arkansas-registered truck travels fewer than the 3,500 miles per year at which its operator could benefit from the annual $175 flat tax (PX 40, 64). The operators of the great majority (76.8%) of these out-of-state trucks therefore satisfy their HUE tax obligation by paying 5¢ per mile—*five times as much as their Arkansas-based counterparts* (PX 40, 51). Even taking into account the relatively small number of non-Arkansas-registered trucks that use Arkansas' highways extensively enough to capitalize on the $175 flat payment option, the average per-mile tax cost for out-of-state trucks was calculated at 3.29¢ by appellants and 3.20¢ by appellees (see PX 40, 64). Thus, using appellees' own calculations, non-Arkansas-registered trucks pay a per-mile HUE tax that is 320% of the per-mile tax paid by trucks registered in Arkansas.

B. The Proceedings Below.

Following a trial, the Chancery Court of Pulaski County sustained the constitutionality of the Arkansas HUE tax and dismissed the complaint (J.S. App. 25a-27a). The court recognized that "[a] tax which is fixed in amount (flat fee tax) for a period of time (such as one year) presumes that the tax impacts differently depending upon

the use made of the privilege taxed" (*id.* at 26a). The court also acknowledged that "[a] flat rate tax which is considered on a mileage basis falls with an unequal burden because those who travel more miles will pay a different per-mile-cost than those who travel less miles" (*ibid.*). Nevertheless, and without further explanation, the court held that the Arkansas HUE tax statute "does not violate the Commerce Clause of the U.S. Constitution" (*id.* at 27a).

On appeal, a divided Arkansas Supreme Court affirmed (J.S. App. 1a-19a). The court first remarked that "[t]he money collected is used to offset highway repairs and costs and thus the HUE tax is in the nature of a user fee or tax" (*id.* at 5a). As the court explained (*id.* at 14a-15a):

> [The HUE tax statute] does not impose a privilege tax but rather exacts a user fee from motor vehicles carrying the prescribed weight. . . .
>
> [It] is a user fee, passed by the Legislature to compensate the state for the wear and tear on the highways caused by trucks carrying the higher weights.

The court then rejected appellants' contention that the Arkansas HUE tax violates the Commerce Clause because it "imposes a far higher effective tax rate on out-of-state trucks than on in-state trucks for the same use of the highways" and because "it is not fairly related to the level of highway services provided by the state to each HUE taxpayer" (J.S. App. 4a). Although the court assumed the validity of the ATA survey results (*id.* at 7a), it held that the HUE tax was consistent with the Commerce Clause. Relying on *Aero Mayflower Transit Co.* v. *Georgia Public Serv. Comm'n*, 295 U.S. 285 (1935), *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U.S. 495 (1947), and *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542 (1950), the court concluded (J.S. App. 6a):

> Here, the amount of the fee is not being challenged as unreasonable *per se*, the money is used for the upkeep of the highways traveled by the carriers being taxed, and the tax applies to foreign and domestic carriers alike. The interstate carriers can opt to pay the flat fee. The fact that they do not make extensive use of the state's highways, does not make the tax levied discriminatory.

Justice Hickman dissented on the ground that the Arkansas HUE tax statute is "[d]iscriminatory, parochial legislation [that] interferes with interstate commerce" (J.S. App. 18a-19a) and thus infringes the Commerce Clause. In his view, the HUE tax "decidedly favors Arkansas-based trucks" because "[i]nterstate truckers, not based in Arkansas, are paying 370% more than Arkansas-based truckers for the damage done [to Arkansas highways]" (*id.* at 18a). Justice Hickman explained:

> [The 5¢ per mile payment] is the only sensible choice for interstate truckers who will not use Arkansas [h]ighways extensively. Arkansas-based truckers just as sensibly choose to pay the $175 per truck every year, because there is no mileage limit with that payment. They can drive thirty thousand miles for considerably less than five cents a mile.

Ibid. The consequence of the HUE tax, as Justice Hickman pointed out, is that even though the statute was designed "to make [heavy trucks] pay for their share of the damage to our highways," Arkansas-based "trucks may do all the damage they want for $175 per year. . . . [T]he tax as delineated does not make those pay who may do the most damage; our own truckers" (*ibid.*).

THE QUESTION IS SUBSTANTIAL

The undisputed evidence in this case demonstrates that the Arkansas HUE tax statute results in flagrant discrimination in favor of trucks registered in Arkansas. Trucks registered outside the State pay a per-mile tax for use of Arkansas' highways that is more than three

times the tax imposed on in-state trucks. This is precisely the sort of local preference that the Commerce Clause was intended to prohibit. Furthermore, the Arkansas statute has led to retaliatory actions by other states, and additional protectionist measures by Arkansas, that strike at the heart of the policy of free interstate trade embodied in the Commerce Clause. Despite all these detrimental effects, the Supreme Court of Arkansas upheld the HUE tax.

The ruling of the Arkansas Supreme Court clashes with well-settled constitutional principles established by this Court. Moreover, the issue presented here is of great and growing economic importance both to the states and to the interstate transportation industry. Since 1980, seven states have enacted highway use taxes that, although facially neutral, impose a higher effective cost per mile on out-of-state trucks than in-state trucks. These laws raise more than $200 million annually, with a disproportionate burden borne by out-of-state motor carriers. Appellants are more than willing to pay their fair share of the costs of maintaining state highway systems, but the cumulative impact of these discriminatory schemes of taxation confers a significant competitive advantage on local truckers at the expense of the interstate trucking industry. In these circumstances, plenary review of the decision below is plainly warranted.

A. The Arkansas Supreme Court Has Decided A Recurring Question Of Substantial Practical Importance.

Authoritative resolution of the constitutional question decided by the Arkansas Supreme Court is of great practical importance to the states and the motor carrier industry. Six states, in addition to Arkansas, have enacted some form of highway use tax that effectively discriminates against interstate commerce.[3] As graphically shown

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[3] Ind. Code Ann § 6-6-8 (Burns Supp. 1986); Ky. Rev. Stat. Ann. § 138.660(4)-(7) (Supp. 1986); Md. Transp. Code Ann. § 13-423(a)

in Appendix I, this type of taxation has become increasingly prevalent in recent years: Pennsylvania first imposed such a tax in 1980, replacing it with a much larger discriminatory tax three years later;[4] Maryland and Vermont followed suit in 1982, Arkansas in 1983, New Jersey in 1984, Indiana in 1985, and Kentucky in 1986. It is essential that this Court declare what the governing rules are before other states adopt similar parochial and discriminatory tax legislation.

The attractiveness of this type of taxation to state legislators reflects the fact that a non-proportional tax grants a competitive advantage to the local trucking industry and levies a disproportionate share of the cost of highway upkeep on non-resident (and non-voting) users. In Arkansas, for example, the State's own evidence showed that in-state trucks paid an average HUE tax of 1¢ per mile, whereas the great majority of out-of-state trucks were forced to pay an HUE tax of 5¢ per mile. As described below (see pages 19-21, *infra*), other states have reacted to these discriminatory consequences by enacting retaliatory measures that threaten a further Balkanization of the economy.

State highway use taxes raise billions of dollars of revenue from the interstate motor carrier industry. The discriminatory taxes in the seven states listed above alone account for more than $200 million annually. These highway use taxes have a significant impact on the operating expenses of tens of thousands of motor carriers.

(1984); N.J. Stat. Ann. § 54.39 A-10 (West Supp. 1986); Pa. Cons. Stat. Ann. tit. 75 § 2102 (Purdon 1981); Pa. Cons. Stat. Ann. tit. 75, § 9901 *et seq.* (Purdon Supp. 1986); Vt. Stat. Ann. tit. 23, §§ 415, 3007, 3010 (1978 and Supp. 1985).

[4] The decision of the Pennsylvania Supreme Court upholding that State's non-proportional marker fee and axle tax (*American Trucking Associations, Inc.* v. *Scheiner*, 509 A.2d 838 (Pa. 1986)) is the subject of a separate appeal to this Court. No. 86—— (filed Sept. 3, 1986). Copies of the Jurisdictional Statement in *Scheiner* are being served on counsel for appellees.

Because of the substantial financial effects and severe economic dislocations attributable to the Arkansas HUE tax and similar state tax laws, the need for guidance from this Court is especially great.

Not surprisingly, the recent proliferation of discriminatory state highway taxes has resulted in a large volume of Commerce Clause litigation, and inconsistent judicial decisions. Highway use taxes that impose higher effective per-mile burdens on out-of-state truck operators have been upheld against Commerce Clause challenges in *American Trucking Associations, Inc.* v. *Scheiner*, 509 A.2d 838 (Pa. 1986), appeal docketed, No. 86—— (U.S., filed Sept. 3, 1986), and *American Trucking Associations, Inc.* v. *Goldstein*, 483 A.2d 47 (Md. 1984). By contrast, a Vermont court, relying on *American Trucking Associations, Inc.* v. *Conway*, 142 Vt. 17, 22, 451 A.2d 42, 45 (1982), granted preliminary relief against the same kind of highway tax on the ground that the tax discriminated in economic effect against out-of-state trucks. See *American Trucking Associations, Inc.* v. *Conway*, [Vt.] St. Tax Rep. (CCH) ¶ 200-263 (Vt. Super. Ct., Washington Co., May 29, 1986).

In addition, highway taxes in New Hampshire, New Jersey, Vermont, Maine, and Connecticut have recently been struck down or preliminarily enjoined on the ground that they discriminated against interstate commerce. See *Private Truck Council of America, Inc.* v. *New Hampshire*, No. 86-088 (N.H. Aug. 12, 1986); *Continental Trailways, Inc.*, v. *Director, Div. of Motor Vehicles*, 509 A.2d 769 (N.J. 1986); *American Trucking Associations, Inc.* v. *Conway*, 508 A.2d 408 (Vt. 1986), petitions for cert. filed, Nos. 86-69 and 86-276, 55 U.S.L.W. 3032 (U.S. July 21, and Aug. 22, 1986); *Private Truck Council of America, Inc.* v. *Secretary of State*, 503 A.2d 214 (Me.), cert. denied on another issue, 106 S.Ct. 1997 (1986); *American Trucking Associations, Inc.* v. *Quinn*, 437 A.2d 623 (Me. 1981); *American Trucking Associa-*

tions, Inc. v. *O'Neill*, 522 F. Supp. 49, 56-57 (D. Conn. 1981). See also *Huie* v. *Private Truck Council of America, Inc.*, 466 N.E.2d 435 (Ind. 1984). This spate of litigation promises to continue absent a definitive ruling on the constitutionality of this new and spreading form of discriminatory taxation.

B. The Commerce Clause Prohibits A State Tax That Results In Discrimination Against Out-Of-State Businesses.

The discriminatory effects of the Arkansas HUE statute violate fundamental precepts embodied in the Commerce Clause. The decisions of this Court recognize that " 'the very purpose of the Commerce Clause was to create an area of free trade among the several States.' " *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388, 402 (1984) (citation omitted). In accordance with that purpose, "[i]t is now established beyond dispute that . . . 'the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.' " *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 328 (1977) (citation omitted).

Central among these limitations is "the fundamental principle . . . [that n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' " *Maryland* v. *Louisiana*, 451 U.S. 725, 754 (1981) (citation omitted). See also *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 268 & n. 8 (1984); *Westinghouse Electric*, 466 U.S. at 402; *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 73-74 (1963). A "State may no[t] . . . use discriminatory taxes to assure that [customers] direct their commerce to businesses within the State," thereby "favor-[ing] local commercial interests over out-of-state businesses" (*Boston Stock Exch.*, 429 U.S. at 334-335).

The Commerce Clause's prohibition against discriminatory treatment of interstate commerce follows inexor-

ably from the basic purpose of the Clause. As this Court noted in *Boston Stock Exch.*, 429 U.S. at 329 (citation omitted):

> Permitting the individual States to enact laws that favor local enterprise at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive" of the free trade which the Clause protects.

Experience has shown that local preferences provoke other states to retaliate by enacting comparable legislation, the practical effect of which is to stifle interstate trade. See *Armco, Inc.* v. *Hardesty*, 467 U.S. 638, 644-645 (1984); *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 379-381 (1976). Such artificial impediments to the free flow of commerce also obstruct market forces and economic efficiency and distort rational tax-neutral decisions. See *Westinghouse Electric*, 466 U.S. at 406; *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350-352 (1977). Finally, the constitutional prohibition of local favoritism reflects "the recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 46 n.2 (1940).

A state statute, even though facially neutral, is invalid under the Commerce Clause if its effect is impermissibly discriminatory.[5] Rather than looking only to the statu-

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[5] A state statute may violate the Commerce Clause because "of either discriminatory purpose . . . or discriminatory effect." *Bacchus Imports*, 468 U.S. at 269-270. While the Court has often looked to the legislative intention behind a statute (see, *e.g.*, *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. at 352), it is clear that a discriminatory effect on interstate commerce, even if not purposeful, is sufficient without more to invalidate the provision under the Commerce Clause. See, *e.g.*, *Halliburton Oil*, 373 U.S. at 72; *Nippert* v. *Richmond*, 327 U.S. 416, 434 (1946).

tory provision on its face, this Court has "determine[d] whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co.* v. *Maxwell*, 311 U.S. 454, 456 (1940). See also *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 616 (1981); *Maryland* v. *Louisiana*, 451 U.S. at 756. Thus, "[t]he principal focus must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980). In examining a statute's practical effects on interstate commerce, the Court has cautioned that "[t]he commerce clause forbids discrimination, whether forthright or ingenious (*Best & Co.*, 311 U.S. at 455). And the Court has ruled that the constitutionally required "equality for . . . [interstate] commerce is measured in dollars and cents, not legal abstractions" (*Halliburton Oil*, 373 U.S. at 70).

In line with these principles, the Court has repeatedly invalidated state tax statutes that discriminated against interstate commerce by operating in a manner that favored in-state over out-of-state companies. As early as *Robbins* v. *Shelby County Taxing Dist.*, 120 U.S. 489 (1887), the Court struck down a tax that, although facially neutral, had a discriminatory impact on out-of-state businesses. There, the Court held unconstitutional a so-called "drummer's tax" on persons who engaged in the sale of goods in Memphis without having a fixed place of business in the city. The Court pointed out that the tax was "discriminative against the merchants and manufacturers of other states" (120 U.S. at 498), who were more dependent than their in-state competitors on the use of such sales arrangements (*ibid.*), and that "[t]his kind of taxation is usually imposed at the instance and solicitation of domestic dealers as a means of protecting them from foreign competition" (*ibid.*).

Likewise, in *Sprout* v. *South Bend*, 277 U.S. 163 (1928), the Court overturned a city licensing fee for buses, again recognizing that a facially neutral tax worked to discriminate against out-of-state companies because the tax was "the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily" (277 U.S. at 170). In *Best & Co.* v. *Maxwell*, *supra*, the Court struck down a facially neutral privilege tax on itinerant sellers, holding that the tax was unconstitutionally discriminatory because it fell with a disproportionately heavy impact on out-of-state businesses and necessarily had no relation to such companies' actual activities in the state (311 U.S. at 456-457). And in *Nippert* v. *Richmond*, 327 U.S. 416 (1946), the Court adhered to "the long-line of so-called 'drummer cases' beginning with *Robbins* v. *Shelby County Taxing District*" (327 U.S. at 417-418) by invalidating a flat tax on persons engaged in business as solicitors. The Court observed that "a single act of . . . solicitation would bring the [flat tax] into play" and that the tax "inherently bore no relation to the volume of business done or of returns from it" (327 U.S. at 427). Based on the effect of the statute, the Court concluded that the tax was "discriminatory in favor of the local merchant as against the out-of-state one" (327 U.S. at 431; see also 327 U.S. at 428, 430-431).[6]

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[6] The above decisions have frequently been cited by the Court in recent opinions. See, *e.g.*, *Westinghouse Electric*, 466 U.S. at 402-403; *Commonwealth Edison*, 453 U.S. at 615, 626, 629; *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. at 37; *Boston Stock Exch.*, 429 U.S. at 329. They illustrate the fundamental principle that the Commerce Clause prohibits as "unconstitutionally discriminatory . . . state taxes nondiscriminatory on their face which, without sufficient justification, impose economic burdens on interstate enterprises which are not in fact imposed on local competitors." L. Tribe, *American Constitutional Law* 356 (1978). The *Aero Mayflower* line of decisions relied on by the Arkansas Supreme Court is discussed at pages 22-26, *infra*.

The itinerant merchants who were the victims of the discriminatory taxes invalidated in *Robbins*, *Best & Co.*, and *Nippert* were in precisely the same predicament as the interstate truckers taking the instant appeal. Because they were not based in the taxing jurisdiction, they were likely to conduct less of their business there and accordingly to find each transaction more heavily taxed than the same transaction engaged in by their competitors based in the taxing jurisdiction. Thus, the Arkansas HUE tax, like the drummer tax, "in its practical operation [is] capable of use . . . to place the merchant . . . doing business interstate at a disadvantage in competition with . . . [businesses] within the state." *McGoldrick*, 309 U.S. at 56.

This Court's most recent decisions have distilled the foregoing Commerce Clause principles into a four-part test. In *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), the Court held that a state tax is valid under the Commerce Clause only if it (1) has a substantial nexus with the state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. The Court has reiterated this standard in virtually every subsequent case challenging a state tax under the Commerce Clause. See, *e.g.*, *Commonwealth Edison*, 453 U.S. at 617, 625-626; *Maryland* v. *Louisiana*, 451 U.S. at 754.

The third prong of the *Complete Auto* test—nondiscrimination—protects interstate commerce by ensuring that it is not subjected to disparate and unfavorable treatment by the state. The fourth prong—proportionality—protects interstate commerce from burdens that are not reasonably related to the extent of a taxpayer's presence or activities in the state (see *Commonwealth Edison*, 453 U.S. at 626). *Complete Auto* thus unquestionably prohibits a tax that, by failing to account for out-of-state companies' lesser presence in the state, operates to impose a greater tax burden on those companies

than on in-state firms. See *Armco*, 467 U.S. at 643 n.6; *Commonwealth Edison*, 453 U.S. at 645 & n.10 (Blackmun, J., dissenting on other grounds) (the *Complete Auto* test requires that a state "impose a proportional rather than a flat tax rate" in order to ensure that the tax is "fairly related to the services . . . provided by the State.").

C. The Arkansas HUE Statute Imposes An Effective Tax Rate That Discriminates Against Out-Of-State Trucks And Thus Violates The Commerce Clause.

1. *The Arkansas HUE Tax Discriminates Against Out-Of-State Trucks And Is Not Fairly Related To The Use Of The State's Highways.*

The authorities summarized above establish that a state tax that favors in-state businesses over their out-of-state competitors violates the Commerce Clause. In particular, a tax that, although facially neutral, results in a disproportionate burden on out-of-state businesses due to their more limited presence in the state both entails prohibited discrimination and is not fairly related to the services (here, highway maintenance) provided by the state. Under this standard, the Arkansas HUE tax, which imposes a markedly higher effective tax rate on trucks registered out-of-state, is plainly unconstitutional.

A flat highway tax applied to both in-state and out-of-state trucks (or, as here, an alternative per mile or flat tax), although neutral on its face, will inevitably operate to the disadvantage of out-of-state companies. Because in-state trucks use the state's highways to a greater extent than out-of-state trucks, the cost of the tax per mile driven—the effective tax rate—will correspondingly be less for in-state vehicles. Since the Arkansas HUE tax is intended to reimburse the State for the wear and tear that large trucks cause to its roads (see J.S. App. 15a), it is clear that the tax, by charging in-state trucks a lower rate for each mile traveled, discrim-

inates against out-of-state trucks. The deterioration to a given mile of roadway that results from the operation of a heavy truck does not depend on the state in which the truck is registered or the extent to which the truck may previously have used the highways of the taxing state.[7]

As discussed above (see pages 3-4, *supra*), the record in this case confirms that self-evident conclusion. The evidence at trial showed that Arkansas-registered trucks use the State's highways far more than non-Arkansas-based trucks. Appellees' own tax records established that, during the survey year, trucks registered in Arkansas drove an average of 17,770 mile in the State. (Appellants' survey placed the figure at 19,386 miles.) By contrast, trucks registered outside of Arkansas drove an average of fewer than 2,900 miles in the State. Accordingly, virtually all (98.4%) of the Arkansas-based trucks paid the $175 flat tax, whereas the great majority (76.8%) of the non-Arkansas-based trucks paid the charge of 5¢ per mile.

These statistics reveal a blatant discrimination: the tax rate paid by most out-of-state trucks is 5¢ per mile, compared to the tax rate of approximately 1¢ per mile (using appellees' figures) for in-state trucks.[8] Even taking into account the relatively small percentage of out-of-state trucks that travel on Arkansas' highways extensively enough to utilize the $175 flat tax option, the effective tax

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[7] In other words, although the purpose of the Arkansas HUE tax is to compensate the State for highway maintenance expenses necessitated by the wear and tear to the highways caused by large trucks, and although one truck traveling 35,000 miles causes the same amount of wear and tear as ten trucks traveling 3,500 miles each, no HUE tax whatever is charged for a truck's use of Arkansas' highways in excess of 3,500 miles per year.

[8] Viewed differently, if the in-state trucks could not resort to the $175 flat tax option and instead had to pay 5¢ per mile, they would owe an average of $888.50 in HUE tax annually (17,770 miles per year times 5¢ per mile).

rate for out-of-state trucks, using appellee's own computations (PX 40), is still more than 300% of that for in-state trucks. The effect of the Arkansas HUE statute is therefore unmistakable: it taxes out-of-state trucks far more heavily than Arkansas-based trucks, thereby exporting a disproportionate financial burden to companies in other states.[9]

This discrimination resulting from the Arkansas HUE tax has several significant consequences. First, it provides a substantial economic advantage to in-state trucks over their out-of-state competitors. A typical Arkansas-based truck need charge only 1¢ per mile to cover its HUE tax cost for transporting cargo over Arkansas' highways. Most operators whose trucks are registered elsewhere would have to charge 5¢ per mile to defray their tax cost for the identical trip. This is quintessentially the kind of parochial legislation and local preference that lies at the core of the Commerce Clause's prohibitions.

Beyond that, the Arkansas HUE tax represents an arbitrary system of compensation for deterioration to the State's highways—a system not at all "fairly related to the services provided by the State." *Maryland* v. *Louisiana*, 451 U.S. at 754. See also *Complete Auto*, 430 U.S. at 279. By imposing an annual flat tax of $175, Arkansas has in effect afforded in-state trucks a "blank check" to cause wear and tear to the highways at no charge once they exceed 3,500 miles. As Justice Hickman ob-

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[9] Not only is the discrimination against out-of-state trucks foreseeable from the terms of the Arkansas HUE statute and confirmed by the record evidence on the actual operation of the tax, but it was also recognized and endorsed by Arkansas officials when the statute was passed. As one newspaper reported at the time Governor Clinton signed the bill into law:

> "I'm proud to sign it," Clinton said of the final form of the bill. As written it charges the "lion's share" of taxes to out-of-state truckers who travel on Arkansas highways, he said.

Arkansas Democrat, March 24, 1983, p. 3B (Abstract of Record 24).

served in dissent (J.S. App. 18a), "Arkansas based trucks . . . may do all the damage they want for $175 per year. . . . [T]he tax as delineated does not make those pay who may do the most damage; our own truckers."

2. *Highway Taxes Like The Arkansas HUE Tax Impose An Adverse Cumulative Burden On Interstate Commerce.*

The economic discrimination worked by the Arkansas HUE statute is greatly exacerbated by the cumulative burden of non-proportional highway taxes. "For if [Arkansas] can impose such burdens, so can every other State," thereby compounding "the resulting impediments upon the free conduct of . . . interstate business." *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 759 (1967). See *Armco*, 467 U.S. at 644; *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 255-256 (1938). In striking down the tax at issue in *Nippert* v. *Richmond*, for example, the Court pointed to the "cumulative burden" that would result from "flat municipal taxes laid in succession upon the itinerant merchant as he passes from town to town," a burden that "will be felt more strongly by the out-of-state itinerant than by the one who confines his movement within the State" (327 U.S. at 429-430). Here, too, widespread adoption of a tax like that imposed by Arkansas would have substantial adverse cumulative effects on interstate commerce.

Consider a motor carrier that operates a fleet of 500 trucks evenly throughout the continental United States. Federal Highway Administration statistics show that its trucks would log an average of 70,000 miles annually, or nearly 1,500 miles in each of the 48 states (see PX 53). If every state imposed a highway use tax identical to the Arkansas HUE tax, the nationwide carrier would be forced to use the expensive 5¢ per mile payment option for its entire operations, because its mileage in each state

would be too low to take advantage of the "free ride" available through the $175 flat payment option to users at levels above 3,500 miles per year. The nationwide carrier would therefore be liable for $1,750,000 (5¢ x 70,000 miles x 500 vehicles) in highway use taxes. By comparison, a carrier with 500 Arkansas-registered trucks that were operated the same number of total miles, but 90% within Arkansas and only 10% in other states, would pay no more than $262,500 ($175 x 500 vehicles in Arkansas + 5¢ x 7,000 miles x 500 vehicles in the other states). Thus, the home-state carrier with relatively localized operations would have a highway tax cost only 15% that of the nationwide carrier, although each would be operating the same number of miles.[10] The cumulative burden on interstate commerce of taxes structured in this discriminatory manner is too plain for dispute. See *American Trucking Associations, Inc.* v. *Conway*, 508 A.2d at 412.

3. *Discriminatory Highway Taxes Have Provoked Economic Retaliation Among The States.*

Beyond discriminating against out-of-state trucks, the Arkansas HUE statute and other discriminatory highway taxes have generated a trade war among the states. Over the past six years, six states, in addition to Arkansas, have granted preferential treatment to local trucks by adopting some form of flat highway tax. See pages 7-8 & note 3, *supra*. Others have passed special retaliatory taxes that apply only to trucks registered in states (such as Arkansas) that have discriminatory or unconventional taxes. See J.S. App. I. And in response to that retalia-

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[10] These figures are not far-fetched. For example, appellant Rollins Leasing Corp., with 1,629 trucks that drove some 4.3 million miles in Arkansas in 1982, incurred an HUE tax bill of over $210,000 (PX 45, p. 20). By comparison, Arkansas-based Tyson Food, Inc.'s 118 trucks drove *more* miles in Arkansas (5.9 million) in the same period at an HUE tax cost of only $20,650—*less than one-tenth as much* (PX 38, p. 4).

tion by its sister states, Arkansas has now enacted legislation that shields Arkansas trucks, and holds them harmless at the State's expense, from the highway taxes of other jurisdictions imposed on Arkansas-registered trucks because of the tax that Arkansas itself imposes. See Ark. Stat. Ann. §§ 75-817.4, 75-817.5 (Supp. 1985) (an Arkansas-based vehicle that has been charged a " 'retaliatory tax' . . . in direct retaliation to and as a direct result of" the Arkansas HUE tax "shall be entitled to reimbursement by the State of Arkansas for the tax so paid.").

The chain of events between Arkansas and the neighboring state of Oklahoma, one of the retaliating states, is illustrative of the compound discrimination attributable to the Arkansas HUE tax. The Oklahoma Tax Commission, directed by the Oklahoma Legislature, reviewed the Arkansas HUE tax and found that it placed Oklahoma-based truckers at a competitive disadvantage. The Commission therefore activated Oklahoma's retaliatory highway tax (Okla. Stat. Ann. tit. 47 § 22.5j(K) (West Supp. 1983), superseded by Okla. Stat. Ann. tit. 47 § 1120(K) (West Supp. 1985)), thereby imposing a $175 or 5¢ per mile tax on Arkansas-based trucks operating in Oklahoma. The discrimination inherent in the Arkansas HUE tax was thus multiplied and redirected at Arkansas-based truckers, increasing the overall burden on interstate commerce. See Abstract of Record 216-220, 222, 228-229, 235.

The unseemly economic conflict among the states that the Arkansas HUE tax has provoked—involving local preferences, retaliatory enactments, and protectionist countermeasures—is wholly incompatible with the fundamental purpose of the Commerce Clause. Furthermore, the added cost to interstate trucking that results from these new levies represents a substantial financial burden and stands as an obstacle to the free flow of commerce that the Constitution commands. "[T]his is the very

kind of barrier the commerce clause was put in the fundamental law to guard against." *Nippert*, 327 U.S. at 434.

4. *Existing Mileage-Related Taxes Provide A Workable Alternative To Discriminatory Taxes.*

The evils caused by the Arkansas HUE tax are entirely avoidable, because a discriminatory tax is unnecessary to achieve the State's legitimate interest in reimbursement for the cost of maintaining its highways. Rather, a mileage-based fuel tax is a readily available alternative that fully compensates the State according to each truck's use of the highways. Every state, including Arkansas, employs a mileage-based fuel tax.[11]

A highway use tax imposed on the basis of mileage, such as the existing Arkansas fuel tax, is the fairest and most economically efficient form of highway tax, tying the amount of the tax to the amount of use of, and wear and tear to, the highways. Especially since a simple increase in Arkansas' fuel tax would both fully serve the State's interest in highway maintenance and completely eliminate the present discrimination against out-of-state trucks, the current Arkansas HUE tax cannot be allowed to stand. It is evident that "the local interest" in raising tax revenues "could be promoted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). See *Edgar* v. *MITE Corp.*, 457 U.S. 624, 640, 643-646 (1982); *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. at 36-37; *Hughes* v.

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[11] See Ark. Stat. Ann. §§ 75-1106, 75-1150, 75-1241, 75-1251, 75-1269 (Repl. 1979); 75-1278 (Supp. 1985). See also Federal Highway Admin., U.S. Dep't of Transportation, *Highway Taxes and Fees, How They are Collected and Distributed*, 1984, at 1-2, 7-9, Tables MF-101, MF-104. These taxes are directly related to mileage traveled, because the more miles a truck is driven in Arkansas, the more gallons of fuel it consumes and the more tax is paid on the fuel. See *American Trucking Associations, Inc.* v. *O'Neill*, 522 F. Supp. at 56.

Oklahoma, 441 U.S. 322, 336 (1979); *Continental Trailways, Inc.* v. *Director, Div. of Motor Vehicles*, 509 A.2d at 778-779.[12]

D. The *Aero Mayflower* Line of Cases, Upon Which The Arkansas Supreme Court Relied, Does Not Sustain The Arkansas HUE Tax.

The Arkansas Supreme Court did not dispute the evidence that compellingly demonstrates that the Arkansas HUE tax operates to discriminate against out-of-state trucks. Rather, the court upheld the HUE tax under the Commerce Clause in sole reliance (J.S. App. 5a-8a) upon this Court's *Aero Mayflower* line of cases. Those cases can no longer be regarded as controlling, however, and do not, in any event, support the validity of the Arkansas tax.

In cases decided between 1935 and 1950, the Court upheld state highway taxes against the argument that the taxes violated the Commerce Clause because they were not graduated according to a vehicle's use of the roads in the state. See *Aero Mayflower Transit Co.* v. *Georgia Public Serv. Comm'n*, 295 U.S. 285 (1935); *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U.S. 495 (1947); *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542 (1950). The *Aero Mayflower* line of decisions reiterated the settled principle that a state tax may not operate to discriminate against interstate commerce. See 295 U.S. at 289; 332 U.S. at 501, 503; 339 U.S. at 544. Moreover, it did not take issue with the general proposi-

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[12] This is not to suggest that a highway use tax, as long as it is mileage-related, must be precisely calibrated to take account of every other conceivable variable that may bear on road maintenance and repair. Some factors may be too insignificant to have an appreciable effect on highway depreciation, or too small in relation to the administrative costs of implementation, to justify their inclusion in the tax methodology. But these considerations cannot justify discrimination that, as in this case, is both egregious and avoidable through practical alternatives.

tion—recognized in cases such as *Robbins* and *Nippert*—that a facially neutral tax may in fact have a disparate impact on out-of-state taxpayers, who have a lesser presence in the state than their in-state competitors.

Nevertheless, the *Aero Mayflower* line of cases upheld flat highway taxes against the claim that they impermissibly discriminated against out-of-state carriers engaged in interstate commerce. On the basis of the records compiled in those cases, the Court reasoned that (1) a tax precisely calibrated to the wear and tear caused to the highways by a particular vehicle would not be administratively feasible; (2) the taxes at issue were imposed for the privilege of using the highways rather than for their actual use, and out-of-state vehicles could not complain if they failed to avail themselves of the opportunity to use the roads as much as in-state vehicles; and (3) the taxes at issue were reasonable in amount and thus not burdensome to interstate carriers. See 295 U.S. at 289; 332 U.S. at 503-504, 506 n.19; 339 U.S. at 544, 546-547. For several reasons, these rationales cannot withstand analysis today.[13]

First, and most important, the Court's concern about the feasibility of administering graduated highway taxes, which was critical to its decisions upholding the flat taxes, no longer applies. As discussed above (see page 21, *su-*

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[13] The *Aero Mayflower* line of decisions was cited by way of analogy in *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707, 715-717 (1972), and *Massachusetts* v. *United States*, 435 U.S. 444, 463-470 (1978). In neither case, however, was there any showing that the challenged tax discriminated between in-state and out-of-state taxpayers. See 405 U.S. at 717, citing *Nippert* v. *Richmond, supra.* Nor in either case was this Court asked to re-examine the *Aero Mayflower* decisions or to harmonize them with its rulings in such cases as *Robbins* and *Nippert*. Finally, the *Evansville* case concerned a tax that was in fact proportional to the taxpayer's use of the state's facilities, while the *Massachusetts* case pertained to the implied immunity of states from federal taxation and did not involve the Commerce Clause at all.

pra), all states, including Arkansas, now commonly utilize a variety of mileage-based highway taxes. Whatever may have been the situation a half-century ago, it is too late in the day for the discrimination inherent in a tax such as the Arkansas HUE tax to be justified by a state's reflexively asserting, or a court's uncritically accepting, a claim of administrative convenience. See *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 587 (1983); *Halliburton Oil*, 373 U.S. at 74 n.9.

By the same token, the "privilege tax" rationale of the *Aero Mayflower* line of cases has no continuing validity. Simply put, a tax is no less discriminatory merely because it is labeled a "privilege" tax rather than a "use" tax. "There is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect." *Complete Auto*, 430 U.S. at 288. This Court's recent decisions have moved away from such empty fictions that serve "only as a rule of draftsmanship" (*id.* at 285), and instead look to the "economic realities" (*id.* at 284) of the challenged tax. See *Westinghouse Electric*, 466 U.S. at 405; *Commonwealth Edison*, 453 U.S. at 614-617. In any event, as the Arkansas Supreme Court declared in this case, the Arkansas HUE tax is a "use" tax, not a "privilege" tax. See page 5, *supra*.

Finally, the nature of the trucking industry has changed dramatically in the past 50 years. Many trucking fleets today comprise hundreds or even thousands of vehicles that regularly operate across state lines, utilizing the federally-funded Interstate Highway System, built largely since 1960. By comparison, Aero Mayflower Transit Co. owned some 70 vehicles at the time of its 1935 litigation. See J.A. 2, *Aero Mayflower Transit Co.* v. *Georgia Public Serv. Comm'n*, 295 U.S. 285 (1935) (No.

586). Unlike in 1935 or 1950, carriers today pay billions of dollars annually in truck registration fees and fuel taxes to compensate the states for highway use. Thus, taxes such as the Arkansas HUE tax work a far greater discrimination against interstate trucks, and result in a far greater aggregate burden on interstate commerce, than was true a half-century ago. See note 11, *supra*.

The operations of the modern interstate trucking industry also belie the Court's assertion in *Aero Mayflower* that the disproportionate impact of a flat tax on an out-of-state trucker results from "his own refusal to enjoy [the privilege of using the state highway] as freely as he may" (295 U.S. at 289). In light of the vast distances now traveled by interstate trucks and the commercial complexity of scheduling nationwide transportation services, it simply defies reality to assert that an out-of-state company "refus[es]" to have its trucks make the same use of a state's highways as in-state trucks do.[14] The *Aero Mayflower* reasoning founders on the fact that an interstate truck cannot be in more than one state at a time; and the larger the number of states in which the interstate truck operates, the greater the discrimination that a flat tax creates. This point, made in Justice Frankfurter's dissent in *Capitol Greyhound*, 339 U.S. at 557, takes on added force in view of current conditions in the trucking industry.

It bears repeating that the decisions of this Court explicating the negative implications of the Commerce Clause are grounded in a " 'practical' analysis" (*Commonwealth Edison*, 453 U.S. at 616) and represent an "evolutionary process" (*Hughes* v. *Oklahoma*, 441 U.S. at 326) of "case-by-case [adjudication]" (*Northwestern*

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[14] The U.S. Department of Commerce Bureau of the Census' *Truck Inventory & Use Survey* indicates that, between 1963 and 1982 alone, the number of heavy trucks (in excess of 19,500 pounds) engaged in long-distance operations (in excess of 200 miles one-way length of haul) increased from 140,000 to 317,800.

States Portland Cement Co. v. *Minnesota*, 358 U.S. 450, 457 (1959)). The Court today is concerned with economic realities, as reflected in the prevailing four-part test of *Complete Auto* and *Maryland* v. *Louisiana*. The *Aero Mayflower* line of cases ignores the practical operation of flat highway taxes and does not address, indeed could not have addressed, the actual impact of such taxes on motor carriers in 1986; these anachronistic cases should not be invoked to sanction the clear discrimination against interstate commerce inflicted by the Arkansas HUE tax.

E. Plenary Review of This Appeal Is Warranted.

Plenary review of this appeal is warranted under 28 U.S.C. § 1257(2). For the reasons discussed above, the decision of the Arkansas Supreme Court sustaining the State's HUE tax is inconsistent with fundamental principles of Commerce Clause analysis articulated in this Court's more recent decisions. Only this Court can reexamine its *Aero Mayflower* decisions and bring them into line with sound Commerce Clause doctrine established in numerous other rulings of the Court. Moreover, the Arkansas tax, and similar highway taxes in other states, are exacting over $200 million annually from interstate carriers and placing such carriers at a severe competitive disadvantage.

Dismissal of this appeal for want of a substantial federal question would constitute a ruling on the merits (see *Hicks* v. *Miranda*, 422 U.S. 332, 343-345 (1975)), which would guide if not control future decisions in the area and thus stultify the continued development of the law in the lower courts. In light of the Tax Injunction Act, 28 U.S.C. § 1341, which severely restricts taxpayers' access to United States district courts, it is quite likely that this Court is the only federal tribunal that will pass on the constitutionality of non-proportional highway taxes. Consequently, summary disposition of this appeal

would leave it entirely to state courts to determine the validity of these state statutes under the Commerce Clause. The policies of both the Commerce Clause and the mandatory review provision in 28 U.S.C. § 1257(2) counsel against such a result.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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APPENDICES

APPENDICES

APPENDIX A

SUPREME COURT OF ARKANSAS

No. 85-101
85-112

AMERICAN TRUCKING ASS'N., INC., *et al.*,
Appellants,

vs.

HENRY C. GRAY, DIR., ARK. HIGHWAY & TRANS. DEP'T, *et al.*,
Appellees,

and

AMERICAN TRUCKING ASS'N., INC., *et al.*,
Appellants,

vs.

CHARLES D. RAGLAND, COMM'R OF REVENUES, REVENUE DIV., *et al.*,
Appellees.

Appeal from Pulaski Chancery Court,
4th Div., Bruce T. Bullion,
Chancellor, #83-2360

Appeal from Pulaski Chancery Court,
2nd Div., John Earl, Chancellor,
#84-374

Opinion Delivered Apr. 14, 1986

JACK HOLT, JR., *Chief Justice*

In this consolidated appeal, the constitutionality of Act 685 of 1983, Ark. Stat. Ann. §§ 75-817.2, 75-817.3 and 75-819(b) (Supp. 1985), is challenged. The Act imposed a Highway Use Equalization (HUE) tax on all trucks that operate on Arkansas highways at maximum weights between 73,281 and 80,000 pounds. The appellants, American Trucking Association[s], Inc., (ATA), filed a complaint in Pulaski Chancery Court, fourth division, against appellees, Arkansas Highway and Transportation Department, alleging that the HUE tax would be an "illegal exaction." Appellants requested a temporary restraining order preventing the money collected under Act 685 from being deposited into the state treasury. Chancellor Bruce Bullion dissolved the temporary restraining order and denied appellants' requested preliminary injunction. That decision was appealed to this court. We affirmed Chancellor Bullion's decision and reserved any further consideration until after a trial on the merits. *American Trucking Ass'n, Inc., et al v. Gray, Director*, 280 Ark. 258, 657 S.W.2d 207 (1983).

The case was remanded, certified as a class action, and the trial on the merits was held. Appellants attempted to prove that the HUE tax as written and administered was violative of the commerce clause, the privileges and immunities clause, and the equal protection clause of the fourteenth amendment to the United States Constitution. Chancellor Bullion ruled on October 11, 1984, that the tax was constitutional and that appellants' counsel were not entitled to attorneys' fees.

On January 25, 1984, the companion case of *ATA, Inc., et al v. Charles D. Ragland, et al*, was filed in the second division of Pulaski Chancery Court. That complaint also challenged the tax as an illegal exaction and alleged that Act 685, which was approved by a mere majority vote of the General Assembly, was subject to

the three-fourths voting majority required by amendment 19 § 2 of the Arkansas Constitution. Chancellor John Earl granted appellees' motion for summary judgment on this issue. Since the facts and issues in the two appeals are similar, they were consolidated in this court. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(a), (c), and (j). We uphold the constitutionality of Act 685.

Act 685 provides that the HUE tax is to be administered for all Arkansas base-registered trucks by the Commissioner of Revenues of the Revenue Division of the Department of Finance and Administration, while the Director of the Arkansas State Highway and Transportation Department administers the tax for all non-Arkansas base-registered trucks. The Act provides that the HUE tax for all vehicles can be satisfied through the election to pay:

1) an annual flat fee of $175;

2) a fee equal to 5¢ per mile for every mile the truck travelled in Arkansas during the previous registration year; or

3) for the purchase of a trip permit at the rate of $8.00 per hundred miles driven.

The appellants primarily rest their arguments on the results of a survey conducted by ATA regarding Arkansas and non-Arkansas base-registered trucks upon which the HUE tax is imposed. The survey results, according to appellants, established that the average cost of complying with the HUE tax, on a per mile of operation basis, affects non-Arkansas base-registered trucks at a rate 370% higher than it impacts Arkansas base-registered trucks. Under these circumstances, appellants maintain the practical effect of the HUE tax is to unconstitutionally discriminate against the non-Arkansas based vehicles' use of the highways. The appellants urge

seven points for reversal, which will be discussed individually.

I.

THE HUE TAX VIOLATES THE COMMERCE CLAUSE

States are not permitted to tax interstate commerce in a manner that discriminates in favor of local interests. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977).

The appellants pursue two theories in their commerce clause argument. First, they state the HUE tax, although facially neutral, imposes a far higher effective tax rate on out-of-state trucks than on in-state trucks for the same use of the highways. Their second argument is that as a flat, nonproportional tax, it is not fairly related to the level of highway services provided by the state to each HUE taxpayer.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the United States Supreme Court considered the validity of a state sales tax under the commerce clause. The Court noted that under its prior decision in *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951), a state tax on the "privilege of doing business" was *per se* unconstitutional when it is applied to interstate commerce. In *Brady*, the Supreme Court overruled *Spector*, and instead, applied a four-part test to determine constitutionality under the commerce clause. Under that test a tax is valid when the tax (1) "is applied to an activity with a substantial nexus with the taxing State", (2) "is fairly apportioned", (3) "does not discriminate against interstate commerce", and (4) "is fairly related to the services provided by the State." In *Burlington N.R.R. Co. v. Ragland, Comm'r*, 280 Ark. 182, 655 S.W. 2d 437 (1983), we acknowledged that "whenever there is a challenge to any state tax on interstate commerce, the tax will be subjected to the *Brady* test."

The appellants maintain that the HUE tax fails to meet the third and fourth prongs of the *Brady* test. Since they admit that the tax is facially neutral, the appellants are claiming in their discussion of the third prong, that its practical effect is to discriminate against interstate commerce. This argument is based on the results of the ATA survey discussed previously. Although several arguments, pro and con, are made about the veracity of the ATA survey, we find no evidence that the HUE tax discriminates against interstate commerce. The tax is structured to offer three options for compliance. A truck that meets the criteria of the tax may pay an annual flat fee, a fee based on mileage, or buy a trip permit. These options are available to intrastate and interstate carriers alike. The money collected is used to offset highway repairs and costs and thus the HUE tax is in the nature of a user fee or tax.

In *Aero Mayflower Transit Co. v. Georgia Public Serv. Comm'n, et al*, 295 U.S. 285 (1935), the U.S. Supreme Court discussed a Georgia statute imposing an annual license fee for the maintenance of the highways. The Court found the statute did not lay an unlawful burden on interstate commerce. In so holding, the Court noted that the fee is a moderate amount, it is used for the upkeep of highways, and "it is exacted without hostility to foreign or interstate transactions, being imposed also upon domestic vehicles operated in like conditions." There, too, the Court was confronted with the argument that the out-of-state carrier uses the roads of Georgia less than the local carriers, yet they pay the same amount. The Court held, "[t]he fee is for the privilege of a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed. . . One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may" (citation omitted).

Here, the amount of the fee is not being challenged as unreasonable *per se*, the money is used for the upkeep of the highways traveled by the carriers being taxed, and the tax applies to foreign and domestic carriers alike. The interstate carriers can opt to pay the flat fee. The fact that they do not make extensive use of the state's highways, does not make the tax levied discriminatory.

Again, in *Aero Mayflower Transit Co. v. Bd. of R.R. Comm'rs of Montana, et al*, 332 U.S. 495 (1947), the Supreme Court discussed two flat highway taxes imposed "in consideration of the use of the highways of this state." The Court found neither exaction discriminated against interstate commerce since each applies alike to local and interstate operations and neither taxes traffic or movements taking place outside Montana. The Court stated:

> Motor carriers for hire, and particularly truckers of heavy goods, like appellant, make especially arduous use of roadways entailing wear and tear much beyond that resulting from general indiscriminate public use. . . Although the state may not discriminate against or exclude such interstate traffic generally in the use of its highways, this does not mean that the state is required to furnish those facilities to it free of charge or indeed on equal terms with other traffic not inflicting similar destructive effects. . . Interstate traffic equally with intrastate may be required to pay a fair share of the cost and maintenance reasonably related to the use made of the highways. (citations omitted).

The appellants maintain that the *Brady* decision overruled the Court's early decisions in the two *Aero Mayflower* cases. We disagree. The Court expressly overruled only *Spector*. It did not so treat these cases. Furthermore, in *Massachusetts v. United States*, 435 U.S. 444 (1978), decided one year after *Brady*, the Supreme

Court analogized the problem of a flat fee registration tax on all civil aircraft, to their previous motor vehicle tax cases, citing the Montana *Aero Mayflower* decision.

The Maryland Court of Appeals reached a similar conclusion in *American Trucking Ass'ns, Inc., et al v. Goldstein, et al*, 483 A.2d 47 (Md. 1984), using reasoning we now adopt. That court discussed an annual registration fee imposed on all motor carriers operated in Maryland. The Maryland court specifically found that *Brady* "did not undercut the previously discussed flat highway user tax cases", which included both *Aero Mayflower* decisions.

In finding that the registration fee did not discriminate against interstate commerce under *Brady*, the Maryland court noted that "[i]t is not aimed at placing interstate business at a competitive disadvantage with local businesses", it "applies equally" to in-state and out-of-state registered motor carriers, and its purpose "is not to protect local carriers against foreign competition." Rather, the court noted its purpose "is to spread evenly among all commercial users the tax burden of supporting Maryland's highway system." The HUE tax meets the same criteria and accomplishes the same purposes.

The appellants claim their statistics show that the HUE tax is discriminatory because, on a cost per mile basis, out of state truckers are charged more. Assuming their statistics are valid, the flat tax portion of our law must, logically, be the most onerous provision. The per mile or per trip alternatives benefit the out of state truckers by permitting them to pay less than the flat tax. We need go no further than to cite the cases holding that a flat tax is not discriminatory. The alternatives offered by our law, which in fact could benefit the out of state truckers, do not make this case distinguishable from the ones approving the flat rate as being a proper tax method in the context of a commerce clause challenge.

As to the argument under the fourth prong of *Brady*, that as a flat tax, it is not fairly related to the level of highway services provided by the state to each HUE taxpayer, it can be answered under the same authority as the previous argument.

The first "flat fee" case dealt with by the U.S. Supreme Court was the Georgia *Aero Mayflower* case, supra. The Court upheld the flat tax then, and in subsequent flat fee cases, holding that a state may impose a flat fee for the privilege of using its roads. In *Capitol Greyhound Lines, et al v. Bruce, Comm'r*, 339 U.S. 542 (1950), the Court held that the formula used in calculating the flat tax was not crucial, rather the relevant inquiry was whether the amount of the tax was excessive. We agree. Acts of the Legislature are presumed to be constitutional and will not be held by the courts to be unconstitutional unless there is a clear incompatibility between the act and the constitution, with all doubts resolved in favor of the act. *Pulaski County Municipal Court v. Scott*, 272 Ark. 115, 612 S.W.2d 297 (1981). Here, the flat tax rate of $175 was not shown to be excessive or unreasonable.

II.

THE HUE TAX VIOLATES THE EQUAL PROTECTION CLAUSE

The fourteenth amendment to the U.S. Constitution provides that no person shall be denied equal protection of the law by any state. Before a statute can be reviewed under the equal protection guarantee, a party must demonstrate that the law classifies persons in some manner. Nowak, Rotunda, & Young, *Constitutional Law*, p. 600 (2d ed. 1983). There are three ways to establish a classification: the statute may do so on its face; a facially neutral statute may be applied unevenly to different groups by those administering it; or a facially neutral law, applied evenhandedly, in reality may con-

stitute a device designed to impose different burdens on different classes of persons. *Id.* The appellants argue that the tax classifies carriers based on interstate versus intrastate commerce.

Once a classification is found to exist, the equal protection analysis turns on whether the classification bears a rational relationship to a legitimate state interest.

We need not reach the rational relationship test, however, because no classification exists. The appellants acknowledge that the statute is facially neutral, so the first method of classifying its not established. The other two methods concern the uneven application and the burdensome effect of a neutral statute. We have already indicated in our discussion of the commerce clause that the statute is applied to interstate and intrastate carriers alike and does not have a discriminatory effect on interstate commerce. Since interstate commerce is not singled out for disparate treatment, no classification on that basis is made, and no equal protection problem arises.

III.

THE HUE TAX VIOLATES THE PRIVILEGES & IMMUNITIES CLAUSE

The privileges and immunities clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States." United States Constitution, Art. IV, § 2. It is well established that the privileges and immunities clause is inapplicable to corporations. *Hemphill v. Orloff*, 277 U.S. 537 (1928); *Western & Southern Life Ins. Co. v. State Bd. of Equalization of Calif.*, 451 U.S. 648 (1981). The named appellants, ATA, et al, are all corporations. Nevertheless, they argue that since their complaint was certified as a class action, there are non-corporate individuals within the class which permits them to raise a privileges and immunities challenge, citing *City of Little Rock v. Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982),

rehearing denied. Cash does not stand for that proposition. The lawsuit in that case was filed by six residents of the city of Little Rock who were water users. The case was certified as a class action. There is no discussion about corporate and noncorporate parties. Nor did our research indicate that there is any case law stating that it will be assumed that noncorporate individuals are included in a class action in a case such as this. In fact in *ATA, et al v. Goldstein, et al, supra,* the same appellants attempted to raise a privileges and immunities argument. The Maryland court noted that the clause was inapplicable to corporations and stated: "[a]ll of the named plaintiffs are corporations. As such, they have no standing to challenge § 423(a) under the Privileges and Immunitise Clause of Art. IV." Here, as in that case, all the named plaintiffs are corporations. Therefore, they have no standing to make this argument.

IV.

THE ARBITRARY & DISCRIMINATORY REGULATIONS & ADMINISTRATION OF THE HUE TAX ARE UNCONSTITUTIONAL

Act 685 divides authority for the administration of the HUE tax between the Commissioner of Revenue of the Department of Finance & Administration (DF&A), for Arkansas base-registered vehicles; and the Director of the Arkansas State Highway & Transportation Department (ASH&TD), for non-Arkansas base-registered vehicles. Appellants do not object to the regulations or administration by the DF&A. Their argument under this point instead is directed toward the ASH&TD, whose regulations and policies, they maintain, violate the commerce clause, the privileges and immunities clause, and the equal protection clause of the Constitution.

We can immediately dispense with the privileges and immunities argument since the named appellants are

corporations. As to the commerce clause and equal protection allegations, the appellants maintain that the regulations and policies of the ASH&TD violate the first and third prongs of the *Brady* test, *supra.* The appellants specifically object to (a) the ASH&TD's general approach, (b) the specialty carrier status, and (c) fleet registration.

(a) The general policies named by appellants are that the ASH&TD, unlike the DF&A, does not allow the owner/operator of non-Arkansas base-registered trucks the option of choosing whether to qualify their trucks by weight for the use of the highways afforded by payment of the HUE tax. The policy appellants are challenging requires non-Arkansas base-registered trucks to either declare that they are carrying 73,281 pounds in Arkansas and pay the HUE tax, or else take some affirmative action to elect not to carry that weight. A non-Arkansas base-registered truck who has not taken either of these actions is not allowed to enter the state. This affirmative action is burdensome on interstate commerce according to the appellants.

The appellants' argument is without merit. All trucks must decree their gross weight for travel in Arkansas. Arkansas base-registered vehicles do so when they register in this state. Those Arkansas vehicles who participate in the International Registration Plan (IRP) declare their weight by a sworn statement on the IRP application. Obviously, a comparable opportunity was needed for non-Arkansas base-registered carriers to declare their gross weight. The Highway Department established a mechanism where a carrier could either qualify and pay the HUE tax or formally declare a gross weight below 73,281 pounds and obtain a free specialty carrier decal. The state's interest in a weight declaration from all trucks travelling on state highways is apparent, satisfying the first prong of *Brady.*

As to the discrimination issue raised under the third prong, all carriers have to take some affirmative action

to declare the weight of their vehicles. Here, ASH&TD had the authority to promulgate its regulation and it is reasonable. As a practical matter the mechanism for registration differed for interstate vehicles, yet the result was the same, without undue burden to interstate commerce. During oral arguments, appellee's counsel explained that to implement registration procedures, it was necessary to utilize a certain policy during the first two years of registration after the act became effective, however, that now there is no difference in registration for those carriers who are members of IRP. They are presently allowed to declare the gross weight of their vehicles when they register in other states. Likewise, non-Arkansas base-registered carriers, who are not members of IRP, still submit an affidavit as to weight and receive a special carrier decal upon entry into Arkansas. These simple methods for carriers to declare gross weight of vehicles for travel in Arkansas are non-discriminatory.

(b) The specialty carrier status was created by regulation and is awarded to carriers entering the state who are carrying below 73,281 pounds or wall within a statutory exemption and are thus not subject to the HUE tax. The specialty carrier decal is given free to those carriers and allows them entry into the state. Appellants contend the status was created by regulation even though the language of Act 685 does not provide a rational basis for the creation of such a classification. This action, they claim, violates the agency's legislative grant of rule-making authority, citing *State, ex rel Attorney General v. Burnett*, 200 Ark. 655, 140 S.W.2d 673 (1940). *Burnett* held that a regulation promulgated by the commissioner of revenues was contrary to the applicable statute and therefore void. The specialty carrier status is not contrary to Act 685. It identifies exemptions to the HUE tax, including trucks carrying less than 73,281 pounds. Since the ASH&TD is required to administer the HUE tax and to do so requires a determination of

the gross weight of vehicles using the state's highways, the designation of the specialty carrier status is a way to facilitate collection of that tax and is within the agency's power to promulgate.

(c) Appellants also complain that non-Arkansas base-registered carriers must qualify their trucks by an "integral fleets" classification, under only one payment option. Arkansas-based owner/operators are allowed by DF&A to pick their payment option and apply it to their individual trucks, according to appellants.

The appellants misinterpret the pertinent policies. The actual practices of the ASH&TD and DF&A are the same: they allow one payment option per fleet. Arkansas base-registered vehicles that are registered under the IRP have their mileage reported by the IRP on a fleet basis. That IRP mileage documentation is then used by the DF&A to allow the carrier to select an option for each fleet. Similarly, the ASH&TD allows mileage documentation to be computed on a fleet basis using either IRP records or other records submitted to a governmental entity for some official purpose. Once the fleet is set, in either case, only one option of HUE payment is allowed.

The ASH&TD allows non-Arkansas based carriers, where separate integral fleets exist under one ownership and separate record and reporting systems are maintained for each integral fleet, to select separate options. Highway Department Regulation V(B). The DF&A also has a regulation stating that IRP qualification shall be on a fleet basis and all affected vehicles will pay either of two relevant options. Highway Use Equalization Tax Regulations, paragraph (8). Mary Ellen Garke, head of the Revenue IRP Unit, testified that a single IRP fleet can select an option but the owner has to then exercise the same option with all the trucks in that account or fleet. Since there is no disparate treatment there is no basis for a claim of discrimination.

V.

ACT 685 OF 1983 WAS NOT ADOPTED IN ACCORDANCE WITH THE REQUIREMENTS OF THE ARKANSAS CONSTITUTION

Amendment 19 § 2 of the Arkansas Constitution provides that no rates for "property, excise, privilege or personal taxes now levied shall be increased by the General Assembly except . . . in case of an emergency, the votes of three-fourths of the members elected to each House of the General Assembly."

The appellants suggest that Act 685 is an increase in an existing "privilege tax" and is therefore subject to the three-fourths vote requirement. In support of their allegation that an existing privilege tax has been increased, appellants point to the registration fee charged under Ark. Stat. Ann. § 75-201 (Repl. 1979 and Supp. 1985), as the tax that Act 685 increased. Appellees maintain this is a new tax on the new privilege of carrying larger loads. We find that amendment 19 § 2 is inapplicable because Act 685 does not impose a privilege tax but rather exacts a user fee from motor vehicles carrying the prescribed weight. In *Evansville-Vanderburgh Airport Auth. Dist., et al v. Delta Airlines, Inc.* 405 U.S. 707 (1972), the U.S. Supreme Court explained:

> that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike . . .
>
> . . . .
>
> At least so long as the toll is based on some fair approximation of use or privilege for use, . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster . . .

Such charges for the use of public facilities, like highways, have been characterized as being in the "nature of rent charged by the State, based upon its proprietary interests in the public property, rather than of a tax." Hartman, *Federal Limitations on State and Local Taxation*, Chapt. 12 p. 665 (1981).

We find that this is a user fee, passed by the Legislature to compensate the state for the wear and tear on the highways caused by trucks carrying the higher weights. It is not a privilege tax in a technical sense. A privilege tax is "[a] tax on the privilege of carrying on a business or a occupation for which a license or franchise is required." Black's Law Dictionary (5th ed. 1979). Trucks not carrying the higher weight are not prohibited from travelling through the state, thus, the HUE tax is not a tax for the privilege of carrying on a business. It is instead a charge for the damage done by trucks carrying the higher weights and is exacted to make repairs. Since the approval of a user fee does not necessitate a three-fourths majority in the Legislature, appellants' argument is without merit.

VI.

THE FINDINGS & CONCLUSIONS OF THE CHANCELLORS ARE INSUFFICIENT UNDER ARCP RULE 52(a)

Arkansas Rules of Civil Procedure Rule 52(a) provides that, in contested actions tried by a judge without a jury, if requested by a party, "the court shall find the facts specifically and state separately its conclusions of law thereon." Appellants here object to the findings of fact and conclusions of law promulgated by the chancellors, claiming they were very brief, general and conclusory in nature. Rule 52(a) does not address the specificity with which findings of fact and conclusions of law must be made. Furthermore, we review chancery cases *de novo* and the chancellors' findings and conclu-

sions are supported by the record in this case. Accordingly, this point is not well taken.

VII.

APPELLANTS SHOULD BE AWARDED ATTORNEYS' FEES WITH REGARD TO ANY REFUNDS RECEIVED BY MEMBERS OF APPELLANT CLASS

The appellants pursue two theories seeking attorneys' fees. Initially they state that if this court should find that the HUE tax is an illegal exaction and refund taxes collected to members of appellant class, that a portion should be awarded as attorneys' fees. Since we find that the tax is constitutional, this argument need not be addressed.

Appellants next contend that, notwithstanding the decision on the merits, Chancellor Bullion erred in denying them an award of $9,270.42 in attorneys' fees. The chancellor found that refunds were made to the class from taxes erroneously collected pursuant to emergency regulations, before the final regulations were enacted. The final regulations did not include this erroneously collected tax. The judge ruled, however, that there was no common fund from which the attorneys' fees could be paid, and denied the claim. We agree.

In *Powell, Mayor of N.L.R. v. Henry*, 267 Ark. 484, 592 S.W.2d 107 (1980), the appellants sought attorneys' fees from refunds that were made to electrical ratepayers. This court held that attorneys' fees were proper because the refund created a common fund, and stated:

> [T]he action was a class action, which resulted in the recovery of a substantial amount which constituted a common fund. The allowance of attorneys' fees from a common fund established or augmented through the efforts of the attorneys to whom the fee is allowed is a well recognized practice and is proper. (citations omitted).

Awards have been made by courts based on the common fund doctrine where the litigation results in the creation of a common fund against which the fees may be awarded. Annotation, 89 A.L.R.3d 690, 701 (1979).

In finding that the common fund requirement was not met, Chancellor Bullion explained in a letter opinion that:

> Because the Court refused to enjoin the collection of this tax, and refused to require the tax monies to be deposited in an escrow account, all of the tax monies collected under Act 685 have been, and are now being deposited in the State Treasury. There is no impounded fund from which costs and fees that might be allowed for a successful taxpayers action to be drawn.
>
> Monies paid by truckers under the offensive emergency regulation long ago ceased to be paid, and those who paid under its mandates received full refunds long ago. It is probably true that other lawful Act 685 taxes are being received by the State on a daily basis, but this tax money is not related to the offensive emergency regulation, rather are being collected pursuant to the valid exercise of the State's power to tax. In this situation, it is beyond the power of this Court to order state government to pay counsel for the class a fee for services, no matter how deserving it may be.

We do not find the chancellor's finding of fact that no common fund was established to be clearly erroneous. Ark. R. Civ. P. 52(a). Accordingly we affirm his judgment.

Affirmed.

Purtle, J., not participating.

Hickman, J., dissents.

DARRELL HICKMAN, Associate Justice, dissenting.

This is a test of the Arkansas Highway Department's answer to the claim that our state's highways will be damaged because of the increase of the maximum weight limit on trucks to 90,000 pounds. The legislature's goal was to tax these heavy trucks to make them pay for their share of the damage to our highways. That worthy goal was partly forgotten by the legislators, resulting in a tax which decidedly favors Arkansas-based trucks. Those trucks may do all the damage they want for $175 per year.

The evidence reflected that interstate truckers invariably choose to pay five cents per mile or purchase a trip ticket, rather than pay the annual fee of $175 per truck. That is the only sensible choice for interstate truckers who will not use Arkansas Highways extensively. Arkansas-based truckers just as sensibly choose to pay the $175 per truck every year, because there is no mileage limit with that payment. They can drive thirty thousand miles for considerably less than five cents a mile.

Interstate truckers, not based in Arkansas, are paying 370% more than Arkansas-based truckers for the damage done. That is discrimination that violates the commerce clause of the United States Constitution. Discriminatory, parochial legislation such as this interferes with interstate commerce, an exclusive province of the federal government. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

Perhaps most important to us in Arkansas is the fact that the tax as delineated does not make those pay who may do the most damage; our own truckers.

The tax must be fairly related to the services provided, in this case decent highways. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). A mile-weight tax is

probably the most fair and sensible answer to the problem: all truckers, Arkansas-based and interstate, pay equally for the damage to the highways. Not only is that sensible, it is unquestionably fair to the people of this state who have to bear any unpaid costs for damage.

I would find the tax violates the commerce clause of the United States Constitution.

APPENDIX B

SUPREME COURT OF ARKANSAS

No. 85-101
85-112

AMERICAN TRUCKING ASS'N., INC., *et al.*,
Appellants,

vs.

HENRY C. GRAY, DIR., ARK.
HIGHWAY & TRANSP. DEP'T, *et al.*,
Appellees,

and

AMERICAN TRUCKING ASS'N, INC., *et al.*,
Appellants,

vs.

CHARLES D. RAGLAND, COMM'R OF
REVENUE, REVENUE DIV., *et al.*,
Appellees.

Appeal from Pulaski Chancery Court,
4th Div., Bruce T. Bullion,
Chancellor, #83-2360

Appeal from Pulaski Chancery Court,
2nd Div., John Earl, Chancellor,
#84-374

Supplemental Opinion on Denial of Rehearing
Opinion delivered May 27, 1986

JACK HOLT, JR., Chief Justice. The appellants filed a petition for rehearing contending in part that we erred by failing to address the question of whether the HUE tax violates the privileges and immunities clause of the United States Constitution.

In the opinion, we incorrectly found the appellants lacked standing to raise this argument since all of the named plaintiffs are corporations and the privileges and immunities clause is inapplicable to corporations.

Appellants maintain in their petition that the parties had stipulated that there were two individuals named in the complaint as representative appellants who were so named for the purpose of raising this issue. The respondent states that this is so. Accordingly, we admit error and address this question on its merits.

The privileges and immunities clause provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities in the Several States:

The United States Supreme Court has explained that "[t]he primary purpose of this clause . . . was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer* v. *Witsell*, 334 U.S. 385, 395 (1948); *see also Paul* v. *Virginia*, 8 Wall. 168 (1868); *Ward* v. *Maryland*, 12 Wall. 418 (1870). In *Ward* v. *Maryland*, the Supreme Court stated:

> Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the Clause plainly and unmistakably secures and protects the rights of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation . . . and to be exempt from any

> higher taxes or excises than are imposed by the State upon its own citizens.

Ward at p. 430.

The HUE tax does not violate the privileges and immunities clause. We have already held that the tax is facially neutral, applying equally to both Arkansas base-registered trucks as well as to non-Arkansas base-registered vehicles. Further, the Arkansas and non-Arkansas based trucks share the same opportunity of carrying the higher weights. Therefore, there is no classification made between citizens of one state as opposed to citizens of another state.

The second argument by petitioners is that the court was incorrect in finding that the tax did not discriminate against non-Arkansas based trucks. Petitioners cite two Vermont cases which have been decided since the arguments were presented in this appeal. We are obviously not bound by the decisions of a Vermont court. Furthermore, in those cases, the court found that the relevant statutes imposed different requirements on out-of-state operators. Here, the HUE tax applies equally to all operators and any disparity in amounts results from the number of miles traveled by their trucks. The rest of petitioners' argument on this issue and their final contention are essentially restatements of their original brief and thus not proper for rehearing. Sup. Ct. R. 20(g).

Rehearing denied.

PURTLE, J., not participating.

HICKMAN, J., would grant rehearing.

APPENDIX C

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS)
) SCT.
In the Supreme Court)

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 1st day, being the first Monday of October, A.D. 1985, amongst others were the following proceedings, to-wit: On the 27th day of May, A.D. 1986, a day of said term

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No. 85-101
85-112

AMERICAN TRUCKING ASSOCIATION, INC., *et al.*,
Appellants,

VS.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPT., *et al.*,
Appellees.

Appeal from Pulaski Chancery Court
Second Div. District

(Chancery Court Case No. 84-374)

Petition for Rehearing is denied. Supplemental opinion rendered. Hickman, J., would grant. Purtle, J., not participating.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated, I, Dona L. Williams, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 27th day of May, A.D. 1986.

/s/ Dona L. Williams
DONA L. WILLIAMS
Clerk

By _____

APPENDIX D

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS

No. 83-2360

AMERICAN TRUCKING ASSOCIATIONS, INC., TRANSCON LINES, INC., DIAMOND TRANSPORTATION SYSTEM, INC., ROLLINS LEASING CORPORATION, AND COMMERCIAL CARRIERS, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILIARLY SITUATED TAXPAYERS; AND ARKANSAS BUS AND TRUCK ASSOCIATION, INC., AND JONES TRUCK LINES, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS,

Appellants

vs.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; DAVID SOLOMAN; RON HERROD; PATSY LEE THOMASSON; RAYMOND PRITCHETT, JR.; AND BOBBY HOPPER; MEMBERS OF THE ARKANSAS STATE HIGHWAY COMMISSION; ROY L. JOHNSON, CHIEF OF THE ARKANSAS HIGHWAY POLICE DIVISION OF THE ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; CHARLES D. RAGLAND, COMMISSIONER OF REVENUES, REVENUE DIVISION, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; MAHLON MARTIN, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION,

Appellees

ORDER

Now on this day comes on to be heard the above styled case with plaintiffs appearing by their attorney, Eugene

Sayre, Defendant Jimmie Lou Fisher, Treasurer of State of Arkansas appearing by her attorney, Frederick Campbell, State Revenue Defendants appearing by their attorney, Joe Morphew, and State Highway Defendants appearing by their attorneys, Thomas B. Keys, Chris Parker, and Ted Goodloe. From the testimony of the witnesses, exhibits and arguments of counsel, the court makes the following findings:

FINDINGS OF FACT

1. Act 685 of 1983 applies to trucks whose declared gross weight is between 73,281 pounds and 80,000 pounds.

2. Basically, Act 685 of 1983 requires those trucks to pay 5 cents per mile for miles operated in Arkansas, with the option to pay an annual $175 fee.

3. The annual fee of $175.00 presumes that those trucks operating in excess of 3500 miles will pay less than 5 cents per mile.

4. A tax which is fixed in amount (flat fee tax) for a period of time (such as one year) presumes that the tax impacts differently depending upon the use made of the privilege taxed.

5. Many taxes are based on an annual amount and the privilege bestowed is without restriction on its use.

6. A flat rate tax which is considered on a mileage basis falls with an unequal burden because those who travel more miles will pay a different per-mile-cost than those who travel less miles.

7. The Arkansas Legislature is not hampered by an inability to draft a flat rate tax which is going to fall with an unequal burden on a cost-per-mile basis.

8. No other findings of facts are required for a decision of this case.

CONCLUSIONS OF LAW

9. The constitutional arguments of plaintiffs' lawsuit are primarily based on the Commerce Clause of the U.S. Constitution.

10. Act 685 of 1983 does not violate the Commerce Clause of the U.S. Constitution.

IT IS THEREFORE ORDERED that the complaint of Plaintiffs is dismissed.

/s/ Bruce T. Bullion
Chancellor
10-11-84
Date

APPROVED:

/s/ Frederick K. Campbell
Attorney for Defendant
Jimmie Lou Fisher, Treasurer
Frederick Campbell

/s/ Joe Morphew
Attorney for State Revenue Defendants
Joe Morphew

/s/ Thomas B. Keys
Attorney for State Highway Defendants
Thomas B. Keys

APPENDIX E

SUPREME COURT OF ARKANSAS

No. 83-209

AMERICAN TRUCKING ASSOCIATIONS, INC., TRANSCON LINES, INC., DIAMOND TRANSPORTATION SYSTEM, INC., ROLLINS LEASING CORPORATION, AND COMMERCIAL CARRIERS, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS; ARKANSAS BUS AND TRUCK ASSOCIATION INC., AND JONES TRUCK LINES, INC., ON BEHALF OF THEMSELVES & ALL OTHER SIMILARLY SITUATED TAXPAYERS,

Appellants

VS.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; DAVID SOLOMAN; RON HERROD; PATSY LEE THOMASSON; RAYMOND PRITCHETT, JR.; BOBBY HOPPER; MEMBERS OF THE ARKANSAS STATE HIGHWAY COMMISSION; ROY L. JOHNSON, CHIEF OF THE ARKANSAS HIGHWAY POLICE DIVISION OF THE ARKANSAS HIGHWAY & TRANSPORTATION DEPARTMENT; CHARLES D. RAGLAND, COMMISSIONER OF REVENUES, REVENUE DIVISION, ARKANSAS DEPARTMENT OF FINANCE & ADMINISTRATION; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; MAHLON MARTIN, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE & ADMINISTRATION,

Appellees

Sept. 19, 1983

PURTLE, Justice.

This appeal is from an interlocutory order denying an injunction to prevent monies being collected for the sale of motor fuels from being deposited into the state treasury and from being distributed to various state agencies, cities and towns. Appellants filed a taxpayers' suit on May 27, 1983, attacking the constitutionality of Act 685 of 1983 claiming it to be an illegal exaction pursuant to Art. 16, sec. 13, of the Arkansas Constitution. The act levied a motor fuel tax upon certain fuels used by the trucking industry. A preliminary injunction was issued on the date suit was filed but was dissolved on July 29, 1983, after several days of testimony. Appellees presented evidence at the hearing on the temporary injunction that they would suffer damages up to $53,000,000 if the injunction were continued. The court set bond in the amount of $53,000,000 in order to stay the dissolution order. The notice of appeal and petition for certiorari was filed with this court on August 1, 1983. Subsequently, we granted appellants' motion to expedite the appeal. The decree of the chancellor is affirmed and the petition for certiorari is denied pending trial of the case on its merits.

At the hearing on the temporary injunction the chancellor found appellants' chances of prevailing on the merits of the case were not good. An order was issued dissolving the temporary injunction. The interlocutory order is an appealable order pursuant to Arkansas Rules of Appellate Procedure, Rule 2(a)6.

Appellants claim that certain findings made by the chancellor were not valid in light of the evidence presented. Disputed findings by a chancellor are upheld on appeal, unless such findings are clearly erroneous. *Gray v. Ragland*, 277 Ark. 232, 640 S.W.2d 788 (1982). Many citations were presented to the chancellor and he was obviously persuaded that the highway use equalization tax

imposed by Act 685 of 1983 would likely stand against attack. In view of the presumption of validity of acts of the Arkansas General Assembly we cannot say the findings of the court below were clearly erroneous. *Arkansas Motor Vehicle Commission v. Cliff Peck Chevrolet, Inc.*, 277 Ark. 185, 640 S.W.2d 453 (1982).

The granting or denying of a temporary restraining order is a matter falling within the sound discretion of the trial court and its decision will not be reversed on appeal unless it is clearly erroneous. *Kreutzer v. Clark*, 271 Ark. 243, 607 S.W.2d 670 (1980).

Appellants correctly contend that irreparable harm must be shown before a restraining order or injunction will issue. The chancellor in this case did not find that irreparable harm would result to appellants. Therefore, an essential ingredient for continuing the temporary injunction is missing. ARCP, Rule 65. *Kreutzer v. Clark, supra.* We do not consider the merits of the case on this appeal. We are convinced that the record supports the chancellor's ruling. The case is scheduled to be heard on its merits before the end of the current month, and should a proper appeal be lodged after the final decision, we will at that time deal with the merits of the case as presented to us. On the present appeal, the decision of the chancellor is affirmed.

HAYS, J., not participating.

APPENDIX F

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

No. 83-2360

AMERICAN TRUCKING ASSOCIATIONS, INC., TRANSCON LINES, INC., DIAMOND TRANSPORTATION SYSTEM, INC., ROLLINS LEASING CORPORATION, AND COMMERCIAL CARRIERS, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS; AND ARKANSAS BUS AND TRUCK ASSOCIATION, INC., AND JONES TRUCK LINES, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS,

Plaintiffs

VS.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; DAVID SOLOMAN; RON HERROD; PATSY LEE THOMASSON; RAYMOND PRITCHETT, JR.; AND BOBBY HOPPER; MEMBERS OF THE ARKANSAS STATE HIGHWAY COMMISSION; ROY L. JOHNSON, CHIEF OF THE ARKANSAS HIGHWAY POLICE DIVISION OF THE ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; CHARLES D. RAGLAND, COMMISSIONER OF REVENUES, REVENUE DIVISION, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; MAHLON MARTIN, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION,

Defendants

[Filed Aug. 1, 1983]

ORDER DENYING PRELIMINARY INJUNCTION

Now on this 29th day of July, 1983, comes on to be heard the above styled case with Plaintiffs requesting the Court to grant a Preliminary Injunction. From the testimony of the witnesses, briefs, and arguments of counsel the Court denies Plaintiffs' Motion for Preliminary Injunction and dissolves the Order of June 1, 1983.

It is therefore ordered that Plaintiffs' Motion for Preliminary Injunction is denied unless Plaintiffs post bond or other surety in the amount of $53,000,000.00.

/s/ Bruce T. Bullion
Chancellor
8-1-83
Date

APPROVED:

/s/ Eugene G. Sayre
Attorney for Plaintiff

/s/ Ted Goodloe
Attorney for State Highway Defendants

/s/ Frederick K. Campbell
Attorney for State Treasurer

/s/ Joe Morphew
Attorney for Department of Finance
and Administration

APPENDIX G

IN THE SUPREME COURT OF ARKANSAS

No. 85-101

AMERICAN TRUCKING ASSOCIATIONS, INC., TRANSCON LINES, INC., DIAMOND TRANSPORTATION SYSTEM, INC., ROLLINS LEASING CORPORATION, AND COMMERCIAL CARRIERS, INC., AND JOE FORTENBERRY, D/B/A FERNWOOD TRANSPORTATION, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS; AND ARKANSAS BUS AND TRUCK ASSOCIATION, INC., AND JONES TRUCK LINES, INC., AND LEON CAWOOD, D/B/A LEON CAWOOD TRUCKING, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS,

Plaintiffs-Appellants

v.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; DAVID SOLOMAN; RON HERROD; PATSY LEE THOMASSON; RAYMOND PRITCHETT, JR.; AND BOBBY HOPPER; MEMBERS OF THE ARKANSAS STATE HIGHWAY COMMISSION; ROY L. JOHNSON, CHIEF OF THE ARKANSAS HIGHWAY POLICE DIVISION OF THE ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; CHARLES D. RAGLAND, COMMISSIONER OF REVENUES, REVENUE DIVISION, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; MAHLON MARTIN, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION,

Defendants-Appellees

[Filed June 17, 1986]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that each and all of above-named Plaintiffs-Appellants hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Arkansas entered in this action on May 27, 1986, affirming the decision and order of the Chancery Court of Pulaski County dismissing the complaint of Plaintiffs-Appellants.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Daniel R. Barney
DANIEL R. BARNEY
ROBERT DIGGES, JR.
ATA LITIGATION CENTER
Alexandria, VA 22314-4654
(703) 838-1865

Counsel for Plaintiffs-Appellants

Of Counsel:

William S. Busker
Vice President,
Legal Affairs
American Trucking
Associations, Inc.

Dated: June 13, 1986

APPENDIX H

ARK. STAT. ANN.

75-817.2. Compliance with highway use equalization tax law prerequisite to operation with weight up to 80,000 pounds.

Any motor vehicle registered in Arkansas at the maximum registration fee for 68,001 to 73,280 pounds, as provided in Subsection (7) of Subsection (C) of Section 24 [§ 75-201] of Act 65 of 1929, as amended, or any motor vehicle registered in any other state to carry in excess of 73,280 pounds, shall be authorized to operate in this State with a gross weight of up to 80,000 pounds, in accordance with Act 7 of 1983 [§§ 75-809, 75-814, 75-816—75-817], provided said vehicle complies with the appropriate Subsections of the following Section 2 [§ 75-817.3] of this Act, the Highway Use Equalization Tax Law.

75-817.3. Highway use equalization tax.

(a) As used in this Section of this Act, the following terms shall have the following meanings:

(1) "Department" means the Director of the Arkansas State Highway and Transportation Department;

(2) "Division" means the Commission of Revenues, Department of Finance and Administration, State of Arkansas;

(3) "Motor Vehicle," as used herein, means all cargo vehicles required to be registered for use upon the public highways of this State, designed, used or maintained primarily for the transportation of property and having a declared gross weight of 73,281 pounds or more. For the purpose hereof, truck-tractors, single unit trucks, semi-trailers and trailers operated in combination thereof shall constitute a single vehicle. The person having the use or

control, or the right to the use or control of the part of such a vehicle furnishing the motive power is the highway user with respect to the entire vehicle and is accordingly subject as such to the provisions of this Section of this Act;

(3) [(4)] "Truck" includes the terms "truck" or "truck-tractor" and "semi-trailer" or "trailer" when operated in combination with a truck or truck-tractor;

(4) [(5)] "User" includes any person having the use and control or the right to the use and control, of any motor vehicle;

(5) [(6)] "Highway" includes all highways, roads, and streets of this State generally open to the use of the public as a way for vehicular traffic;

(6) [(7)] "Gross weight" means the actual weight of the truck or truck-tractor, plus the actual weight of the heaviest semi-trailer or trailer or combinations thereof with which it is to be operated in combination plus the actual weight of the heaviest load to be carried thereon.

(7) [(8)] "Arkansas Registered Vehicle" or "Arkansas Registered Truck" means a vehicle registered in Arkansas by a user who is an Arkansas resident, and bearing an Arkansas license plate.

(b) A tax is hereby imposed upon all users, as defined in Subsection (a), above, of motor vehicles, as herein defined, in compensation for the use of the highways of this State to be known as the "Highway Use Equalization Tax". Such tax shall be in addition to all other taxes now required to be paid on such vehicles except as hereinafter provided.

(c) The Highway Use Equalization Tax shall not apply to any motor vehicle whose declared gross weight, as defined in Subsection (a), above, is 73,280 pounds or less; nor to vehicles used exclusively in hauling unfinished and unprocessed farm products, forest products, clay

minerals or ores, from the point of production, harvesting or severance to the point at which the same shall first undergo any processing, preparation for processing, conversion or transformation from their raw, natural or severed state; nor to vehicles used exclusively for hauling animal feed by owners of livestock or poultry for consumption by livestock or poultry owned by them; nor to any vehicle owned and operated by the United States of America or the State of Arkansas, or any political subdivision thereof.

(d) The provisions of this Section of this Act shall not apply to any motor vehicle used on an interstate trip with an origin or destination within 10 miles of the geographic boundaries of this State, provided the one-way travel distance in the State is not over 10 miles.

(e) (1) The user of every vehicle subject to this Section of this Act and which is an Arkansas registered vehicle, before operating such vehicle over the highways of this State, shall qualify such vehicle with the Division. Qualifications shall be made by application to the Division on forms to be provided by said Division. Said application may be filed with the Division at the time of registration of the vehicle.

(2) Such application shall be accompanied by payment to the Division of a fee of five dollars ($5.00), to be deposited into the Constitution and Fiscal Agencies Fund, which shall cover the clerical cost of such qualification. Upon receipt of such application and payment of the tax as hereinafter determined, the Division shall make appropriate record of the vehicle qualified and certify such qualification on the applicant's registration certificate or a registration cab card, one of which is to be carried in the cab of the vehicle at all times. The said registration certificate or registration cab card shall, in addition to the registration information and the required certification, show the amount of tax paid for such vehicle as determined by Subsection (f) of this Section.

(f) (1) At the time of such qualification of any Arkansas registered truck subject to this Section which is registered through the International Registration Plan, the Division may fix a mileage rate in cents per mile for each truck so registered and qualified. The Division shall determine the mileage rate, utilizing the gross weight declared in the application for registration of the truck, according to the following table:

Vehicle Weight (pounds)	Mileage Rate (dollars)
73,281—80,000	$.05

The tax determined under this provision for every truck subject thereto shall be in the amount of the determined mileage rate multiplied by each mile such truck is operated over the highways of this State, as reported to the Division for registration under the International Registration Plan.

(2) At the time of such qualification of any Arkansas registered truck subject to the provisions of this Section, every user not registered through the International Registration Plan shall pay, and every user registered through the International Registration Plan may elect to pay, an annual mileage tax in lieu of an amount determined by the application mileage rate set forth by Subsection (f) (1) of this Section. The Division shall determine such annual mileage tax by utilizing the gross weight declared in the application for registration of the truck, according to the following table:

Vehicle Weight (pounds)	Annual Tax (dollars)
73,281—80,000	$175

(g) The tax, as determined by either Subsection (f) (1) or Subsection (f) (2) of this Section, shall become due and payable at the time of registration. No license shall be issued, nor operation authority granted, to any Arkansas registered user subject to the provisions of this Act until such time as the full amount of the tax

determined to be due under the provisions of this Section, together with all penalties, shall have been paid.

(h) The Division is hereby authorized to collect those taxes and fees imposed by this Section upon the Arkansas registered users subject to the provisions of this Act [§§ 75-81.72, 75-817.3, 75-819(b)], to make timely deposits into the State Treasury of all such moneys collected by the Division, and to administer the provisions of this Section as they pertain to Arkansas registered users, including the right to inspect and audit at reasonable times at any place within this State the books, records and documents of any Arkansas registered users required to pay the Highway Use Equalizaton Tax hereby imposed.

(i) (1) The user of any vehicle, subject to the provisions of this Section, may, in lieu of qualification in accordance with the provisions of Subsection (e) of this Section, remit to the Department either an annual mileage tax in an amount determined by Subsection (f) (2) of this Section, or pay an amount determined by the applicable mileage rate set forth in (f) (1) of this Section, or pay a trip permit fee. It is the intent of this Act that all users, subject to the provisions of this Section, must either qualify with the Division as provided in Subsection (e) of this Section and pay the appropriate taxes, or comply with the provisions of this Subsection. Provided, that, all Arkansas registered vehicles must qualify with the Division and remit such taxes to the Division. If the user elects to pay the annual mileage tax, the Department, upon application thereof and receipt of such payment, shall issue an annual mileage tax certificate to the user which shall, by the user, be affixed to the cab of such vehicle. If the used elects to pay an amount determined by the applicable mileage rate set forth in (f) (1) of this Section, the Department shall utilize the appropriate rate multiplied by each mile such vehicle was operated over the highways of this State for the preceding

twelve month period based on mileage records of the user acceptable to the Department. Upon payment of such amount, the Department shall issue a certificate to the user, which shall, by the user, be affixed to the cab of such vehicles. If the user elects to utilize a trip permit, such trip permits for trucks with a gross weight of 73,281 pounds through 80,000 pounds shall be issued at a fee of eight dollars ($8.00) for each 100 miles of travel, rounded to the nearest 100 miles, whether loaded or unloaded. Said permits shall be issued by the Department in such forms as it deems appropriate.

(j) The tax provided for in this Section of this Act must be paid by the users of all applicable vehicles using the highways of this State, and no reciprocal agreement or agreement of any nature heretofore or hereafter entered into between officials of this State and those of any other State may exempt any user of such vehicles using the highways of this State from the provisions of this Section of this Act and payment of the tax levied by this Section of this Act.

(k) Any user found operating any vehicle subject to the provisions of this Section of this Act over the highways of this State without complying with this Section or without having available in or on the cab thereof the appropriate certificate or trip permit required by this Section, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of no less than two hundred dollars ($200.00) and not more than five hundred dollars ($500.00) for the first offense and of no less than five hundred dollars ($500.00) and not more than one thousand dollars ($1,000.00) for each subsequent offense.

(*l*) This Section of this Act shall be liberally construed to effectuate the purposes thereof.

(m) All fees, taxes, penalties and interest collected under the provisions of this Section of this Act not spe-

cifically classified as "Constitutional and Fiscal Agencies Funds" shall be classified as "special revenues" and shall be deposited in the State Treasury, and the net amount thereof shall be transferred by the State Treasurer on the last business day of each month: 15% of the amount thereof, to the County Air Fund; 15% of the amount thereof, to the Municipal Air Fund; and 70% of the amount thereof, to the State Highway Department Fund, such funds to be further disbursed in the same manner and used for the same purposes as is set out in the "Arkansas Highway Revenue Distribution Law."

75-817.4. Retaliatory tax defined.

For the purposes of this Act [§§ 75-817.4—75-817.6], "retaliatory tax" means an amount assessed by another state against a motor vehicle user in direct retaliation to and as a direct result of the imposition of the Arkansas Highway Use Equalization Tax under Section 2 of Act 685 of 1983 (Arkansas Statutes 75-817) [§ 75-817.3], which would not have been assessed in the absence of the Arkansas Highway Use Equalization Tax.

75-817.5. Reimbursement for retaliatory tax assessments—Application.

Any motor vehicle user who has been assessed a retaliatory tax by another state after July 1, 1983 and has paid the tax shall be entitled to reimbursement by the State of Arkansas for the tax so paid. Any person desiring reimbursement as provided herein shall apply to the Highway Use Equalization Tax Unit of the Arkansas Highway and Transportation Department and shall furnish the Unit a copy of the receipt for the payment of the retaliatory tax for which reimbursement is requested, together with such other information as the Unit may reasonably request in order to verify that the applicant is entitled to reimbursement.

75-817.6 Funding for reimbursements.

When the Highway Use Equalization Tax Unit determines that any applicant for reimbursement under this Act [§§ 75-817.4—75-817.6] is entitled to such reimbursement, the Highway and Transportation Department is authorized to make such reimbursement out of any funds on hand which were received by the Highway and Transportation Department from the Arkansas Highway Use Equalization Tax levied in Act 685 of 1983 [§§ 75-817.2, 75-817.3, 75-819].

75-819. Penalty.—(a) Any operator found violating the provisions of this Act [§§ 75-813—75-818, 75-819], or any owner, principal, employer, lessor, lessee, agent, or officer of any firm or corporation who permits such operator to violate said provisions shall be guilty of a misdemeanor and upon first conviction thereof shall be punished by a fine of not more than one hundred dollars ($100.00) and for a second conviction within one [1] year shall be punished by a fine of not more than two hundred dollars ($200.00) and for a third conviction and each successive conviction within one [1] year shall be punished by a fine of not more than five hundred dollars ($500.00).

(b) Provided further that if the weight of the vehicle and load exceeds the maximum as prescribed by this Act [§§ 75-813—75-817, 75-818, 75-819] or the gross weight as provided by a special permit, the operator or any owner, principal, employer, lessor, lessee, agent or officer of any firm or corporation who permits such operator to exceed the weight load herein provided or as provided by a special permit shall, in addition, pay a penalty to be computed as follows:

(1) Overweight one thousand (1,000) pounds or less, a minimum penalty of ten dollars ($10.00), or a maxi-

mum penalty of not more than two cents (2¢) per pound of excess weight;

(2) Overweight more than one thousand (1,000) pounds and not more than two thousand (2,000) pounds, a penalty of not more than three cents (3¢) per pound of excess weight;

(3) Overweight more than two thousand (2,000) pounds and not more than three thousand (3,000) pounds, a penalty of not more than four cents (4¢) per pound of excess weight;

(4) Overweight more than three thousand (3,000) pounds, a penalty of not more than five cents (5¢) per pound for each pound of excess weight.

Provided, further, where the operator of an overloaded truck found to have willfully avoided being weighed at a weigh station in this State, the penalty shall be computed by doubling the otherwise appropriate penalty set out in (1), (2), (3), or (4), above.

(c) All fines and penalties shall be collected as now provided by law but all penalties collected shall forthwith be transmitted by the authority collecting the same to the State Treasurer and credited by him to the State Highway Fund. It shall be mandatory and not within the discretion of the Court to assess the penalty provided for.

(d) It is further provided that when any vehicle is found to exceed any weight limitation imposed by this Act or the gross weight provided by special permit, such vehicle shall be stopped at a suitable place and remain standing until such overweight shall have been removed or additional permit obtained as provided in this Act.

APPENDIX I

DISCRIMINATORY STATE HIGHWAY USE TAXES

STATE	STATUTORY AUTHORIZATION	DESCRIPTION	LITIGATION
1. Arkansas	1. A. Ark. Stat. Ann. § 73-1779 (Repl. 1979) B. Ark. Stat. Ann. §§ 75-817.2, 75-817.3 (a)(3), (4), and (5) (Supp. 1985)	1. A. Retaliatory charge levied in response to Interstate Commerce Commission Authority registration fees B. Heavy vehicle use tax imposed on trucks with gvw over 73,280 pounds at $175 annually or 5¢ per mile	1. A. None B. *American Trucking Associations, Inc. ("ATA") v. Gray*, 707 S.W.2d 759 (Ark. 1986) (appeal pending) (tax found constitutional under *Aero-Mayflower* line of cases)
2. Connecticut	2. Conn. Gen. Stat. Ann. § 12-487 (West 1983)	2. $40 fuel tax decal	2. *ATA v. O'Neill*, 522 F.Supp. 49 D. Conn. 1981) (following issuance of preliminary injunction enjoining enforcement of tax, state legislature lowered fee to $10)
3. Delaware	3. Del. Code Ann. tit. 21, § 402 (1985)	3. Retaliatory tax—not currently in effect	3. None
4. Florida	4. Fla. Stat. Ann. § 207.004(5)(d) (West Supp. 1986)	4. Retaliatory tax—imposed in response to *inter alia* Arkansas HUE tax and Pennsylvania axle tax	4. *Private Truck Council of America, Inc. ("PTCA") v. Florida Dept. of Revenue*, No. 85-368 (Fla. Cir. Ct., Leon Cty.)
5. Georgia	5. Ga. Code Ann. § 40-2-111 (1985)	5. Retaliatory tax—imposed in response to *inter alia* Arkansas HUE tax and Pennsylvania axle tax	5. *PTCA v. Georgia*, No. D15385 (Ga. Super. Ct., Fulton Cty.)
6. Illinois	6. Ill. Ann. Stat. ch. 95½, § 18-801 (Smith-Hurd 1971)	6. Retaliatory tax—not currently in effect	6. None
7. Indiana	7. A. Ind. Code Ann. § 9-7-8-1 (Burns 1980) B. Ind. Code Ann. § 6-6-8 (Burns Supp. 1986) C. Ind. Code Ann. §§ 6-1.1-8-2 and 6-1.1-8-12.5 (Burns 1984)	7. A. Retaliatory tax—not currently in effect B. $50 per truck flat highway use tax C. Indefinite-situs property tax	7. A. None B. None C. *Huie v. PTCA*, 466 N.E.2d 435 (Ind. 1984) (tax found to discriminate against interstate commerce)
8. Iowa	8. Iowa Code Ann. § 326.32 (West 1985)	8. Retaliatory tax	8. None
9. Kansas	9. Kan. Stat. Ann. § 74-4302 (1985)	9. Retaliatory tax	9. None
10. Kentucky	10. Ky. Rev. Stat. Ann. § 138.660(4)-(7) (Baldwin Supp. 1986)	10. $150 to $200 per truck highway use tax	10. *ATA v. Kentucky*, No. 86-CI-0464 (Ky. Cir. Ct., Franklin Cty.)
11. Louisiana	11. A. La. Rev. Stat. Ann. § 47:511 (West 1970) B. La. Rev. Stat. Ann. § 45:163.1 (West Supp. 1986)	11. A. Retaliatory tax—not currently in effect B. Public Service Commission registration tax	11. A. None B. *PTCA v. Louisiana*, No. 289, 481 [2 La.] St. Tax Rep. (CCH) T 800-890 (La. D. Ct. 19th J.D., DIVH, June 20, 1986) (tax found to discriminate against interstate commerce)
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No. 86-358

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In the

Supreme Court of the United States

October Term, 1986

American Trucking Associations, Inc., et al.,

Appellants

V.

Henry C. Gray, Director, Arkansas Highway and Transportation Department, et al.,

Appellees

ON APPEAL FROM
THE SUPREME COURT OF ARKANSAS

MOTION TO DISMISS
JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the Arkansas HUE tax, the proceeds of which are legislatively dedicated for highway construction and repair, and which is payable by all motor vehicles with a declared gross weight of 73,281 pounds or more, at a rate of a nickle a mile to a maximum of $175.00, violated the Interstate Commerce Clause of the United States Constitution.

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No. 86-358

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American Trucking Associations, Inc., et al.,

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V.

Henry C. Gray, Director, Arkansas Highway and Transportation Department, et al.,

Appellees

ON APPEAL FROM
THE SUPREME COURT OF ARKANSAS

MOTION TO DISMISS JURISDICTIONAL STATEMENT

APPELLEE'S MOTION TO DISMISS AND AFFIRM

Appellee, pursuant to Rule 16.1(b) moves the Court to dismiss the appeal herein or, in the alternative, to affirm the Judgment of the Supreme Court of Arkansas on the ground that the appellants' Jurisdictional Statement raises no substantial federal question.

STATEMENT

In 1983 the Arkansas legislature raised the gross weight limit for motor vehicles traveling over the highways of the state from 73,280 pounds to 80,000 pounds. Act 7 of 1983, Ark. Stat. Ann. §75-817 (Supp. 1985). In that same session the legislature also passed a tax package, Act 685 of 1983, Ark. Stat. Ann. §§75-817.2, 75-817.3 (Supp. 1985) which applied to "all motor vehicles . . . having a declared gross weight of 73,281 pounds or more." Ark. Stat. Ann. §75-817.3 (a)(3). All revenues raised by Act 685 are legislatively designated as special revenues to be exclusively used for road construction and repair by the State and its cities and counties. Ark. Stat. Ann. §75-817.3(m). This non-discriminatory, special revenue "user fee" tax package is being challenged by the appellants as a violation of the Commerce Clause of the United States Constitution.

The thrust of this challenge is an allegation of a "discriminatory impact" of the Act 685 tax package between Arkansas registered motor vehicles and non-Arkansas registered motor vehicles. In order to assess this challenge (and see, in short, the artificiality of this dichotomy) the Court needs some basic facts concerning both modern truck registration laws and the way in which the challenged Arkansas tax package actually operates within the existing registration system. The Court also needs to understand, at the front end, that under the challenged Arkansas law it makes absolutely *no difference in either the options for payment available to a carrier or the tax liability of any individual tax payer whether a motor vehicle is base-plated in Arkansas or base-plated elsewhere.*

A. *Truck Registration, Reciprocity, and the IRP:*

Arkansas imposes a general statutory requirement that all motor vehicles be registered in this state in order to travel on its highways. Ark. Stat. Ann. §§75-809 (Supp. 1985), 75-131, 132 (Repl. 1979). Registration includes payment of a statutory fee

based upon the type of vehicle, as well as its declared gross weight. Ark. Stat. Ann. §75-201 (Repl. 1979). Since 1945, however, Arkansas officials have been authorized to enter into reciprocal agreements with other states to authorize the travel of non-Arkansas "plated" vehicles. Ark. Stat. Ann. §§75-250, 251 (Repl. 1979).

These agreements fall into two types.

The older of these two kinds of agreements are known as "bilateral reciprocity agreements". The essence of such an agreement is that Arkansas agrees to allow, say, trucks base-plated in Rhode Island to travel in Arkansas without paying the Arkansas fee or securing an Arkansas plate, so long as Rhode Island accords reciprocal privileges to Arkansas base-plated vehicles. No money is exchanged. Arkansas currently has bilateral reciprocity with 15 states, primarily those in the Northeast.

All remaining states, including all states contiguous with Arkansas, are, like Arkansas, members of the International Registration Plan. The IRP is an informal compact among its participating states, two provisions of which are important to an understanding of the issues here. First, registration fees are apportioned among member jurisdictions based upon the *percentage* of any carrier's miles generated in each state. [1] In other words, suppose a carrier will travel in Tennessee, Missouri and Arkansas. If he registeres his vehicle in Tennessee (his "Base" state) he

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1

IRP § III A states: "A. The registration fee for apportionable vehicles shall be determined as follows: (1) Divide the In-jurisdiction miles by total miles generated during the preceding year. (2) Determine the total fees required under the laws of each jurisdiction for full registration of each vehicle at the regular annual or applicable fees, or for the unexpired portion of the registration year. (3) Multiply the sum obtained under Paragraph 2 of this section by the quotient obtained under Paragraph 1 of this section" *International Registration Plan, with Official Interpretations*, American Association of Motor Vehicle Administrators, (Rev. 1981), at 9. IRP manuel introduced as PX.6.

purchases a Tennessee IRP apportioned plate and declares on the appropriate form that he will travel for example, 25% of his miles in Arkansas, 25% in Tennessee, and 50% in Missouri. His license fee in Tennessee will be the sum of 25% of the statutory Tennessee fee, 25% of the Arkansas fee, and 50% of the Missouri fee. He pays this to Tennessee after which Tennessee then forwards the respective amounts to Arkansas and Missouri. The second critical provision of the IRP is related to this: where a motor vehicle is base-plated makes no difference in the amount any other state receives in registration fees; therefore, a carrier is allowed to base-plate in any IRP jurisdiction in which he has an office with a street address to which records can be brought and in which he generates any mileage at all with any of his vehicles. [2]

B. ***Taxes Imposed Under Act 685 of 1983:***

After the gross weight limit in Arkansas was raised from 73,280 pounds to 80,000, the legislature imposed two

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2

IRP § II (C) (1) states: "C. 1. 'Base Jurisdiction' means, for purposes of fleet registration, the jurisdiction where the registrant has an established place of business, where mileage is accrued by the fleet and where operational records of such fleet can be made available in accordance with the provisions of Article XIV, A(2) . . . Although 'an established place of business' is not defined, it is construed to mean . . . a physical structure owned, leased or rented by the fleet registrant the location which is designated by street number or road location, and which is open during normal business hours, and in which are located: 1) a telephone or telephones publicly listed in the name of the fleet registrant, 2) a person or persons conducting the fleet registrant's business, and, 3) the operational records of the fleet (unless such records can be made available in accordance with the provisions of Article XIV.A.2.) A question has arisen whether all vehicles of a fleet must accrue miles with the jurisdiction chosen as 'base'. If this interpretation were adopted, the registrant would be forced to make certain that every vehicle of a fleet traveled some of its miles in the 'base' each year. This requirement would contravene the purpose of granting operational flexibility. The Plan is construed broadly to require only the accrual of miles by the fleet as a whole; each vehicle need not individually enter the base jurisdiction." Id., at 5.

taxes on this new weight category. First, all of those vehicles which were previously required to pay a registration fee to Arkansas are required to calculate that fee for this new class of vehicles "at the maximum registration fee for 68,001 to 73,280 pounds, as provided in Subsection (7) of Subsection (c) of Section 24 . . . ". Ark. Stat. §75-817.2 (Supp. 1985). Second, the Act also imposes the Highway Use Equalization Tax of Ark. Stat. Ann. §75-817.3 (Supp. 1985), payable generally at $ .05 a mile up to a maximum payment of $175.00.

For analytical purposes, there are really three groupings of motor vehicles from which payment is exacted.

First, wholly intrastate Arkansas carriers with a declared gross weight of over 73,280 pay a flat registration fee of $1,044.00 (See, Ark. Stat. Ann. §75-201(c)(7) (Repl. 1979)) plus a flat $175.00 HUE tax imposed by Ark. Stat. Ann. §75-817.3(f)(2). Intrastate carriers do not have the five cent/mile option because they are not subject to apportioned registration under the International Registration Plan and hence do not report their mileage to anyone.

Second, motor vehicles base-registered in any IRP signatory state pay an apportioned registration fee to Arkansas through the International Registration Plan. As stated above the fees under this apportioned registration system are based not on actual miles, but on the percentage of miles traveled in this state. For example, a heavy motor vehicle traveling 10% of its miles in Arkansas will pay a registration fee of 10% of $1,044.00 or $104.40. In addition such a carrier will pay the HUE tax at a rate of five cents/mile to a maximum of $175.00 or purchase individual trip permits at a rate of $8.00/hundred miles. [3] Ark. Stat. Ann. §75-817.3(f), (i) (Supp. 1985).

3

Appellees concur with appellants' Jurisdictional Statement, at 3, n.1. This option is not material to the resolution of this case.

Third, non-IRP registered vehicles secure authority to travel in Arkansas for registration fee purposes through "reciprocity". Such non-Arkansas, non-IRP base registered vehicles paid no registration fee in this state prior to the enactment of Act 685 and continue to pay none. See Ark. Stat. Ann. §75-817.2 and Ark. Stat. Ann. §75-817.3(b) (Repl. 1985). They do however pay an HUE tax (if they declare through the qualification process a gross weight in Arkansas in excess of 73,280 pounds) of five cents/mile to a maximum of $175.00 or purchase individual trip permits at a rate of $8.00/hundred miles.

C. ***This Litigation.***

This appeal is from a decision of the Arkansas Supreme Court affirming two challenges to Act 685 of 1983 consolidated by the State Supreme Court for purposes of appeal. Only the first of those cases, *Arkansas Trucking Associations, Inc. v. Gray et. al.*, Ark. S.Ct. No. 85-101 involved an issue covered by the appellants' Jurisdictional Statement. The second case, *Arkansas Trucking Associations, Inc. v. Ragland, et al.*, Ark. S.Ct. No. 85-112 involved the construction of Amendment 19 to the Constitution of the State of Arkansas. There is apparently no appeal from that decision and none would lie.

THE APPEAL DOES NOT RAISE ANY SUBTANTIAL FEDERAL QUESTIONS

A. ***The Challenged Tax Is A Facially Neutral User Fee Valid Under Capitol Greyhound v. Brice, 339 U.S. 542 (1950) And Massachusetts v. United States, 435 U.S. 444 (1978).***

The challenged HUE tax portion of the taxes levied by Act 685 of 1983, Ark. Stat. Ann. §75-817.3 (Supp. 1985), can be analyzed as a flat rate tax of $175.00 with a payment option for carriers traveling less than 3500 miles in

Arkansas that provides them with a dollar and cents tax savings upon payment at a rate of a nickle a mile. As the Arkansas Supreme Court correctly found: "[t]he money collected is used to offset highway repairs and costs and thus the HUE tax is in the nature of a user fee or tax." *American Trucking Associations v. Gray*, 288 Ark. 488, 495, 707 S.W.2d 759, 762 (1986); Ark. Stat. Ann. §75-817.3(m) (Supp. 1985). The tax is non-discriminatory on its face, applying to "all users of motor vehicles" (Ark. Stat. Ann. §75-817.3(b), with "motor vehicles" previously defined as any vehicle " . . . having a declared gross weight of 73,281 pounds or more." Ark. Stat. Ann. §75-817.3(a)(3).

The appellants admit this facial neutrality. But, in their attempt to develop a "substantial federal question", they skirt its essential correlaries: All options of payment are freely available to all users of motor vehicles regardless of where they may be base-registered and it makes absolutely no difference in the actual tax liability of any individual carrier what base-plating may have been chosen.

It is of course recognized that *any* flat rate vehicle tax will inevitably result in different payments per mile based upon the number of miles traveled in the taxing jurisdiction. This will be true even under a tax like that challenged here in which this result is ameliorated somewhat by the nickle a mile option. Although tangential reference is made in the appellant's Jurisdictional Statement to numerous contemporary commerce clause cases, the sole line of doctrinal support that this feature renders a flat rate tax unconstitutional is found in this Court's handling of the "drummer cases" culminating in *Nippert v. Richmond*, 327 U.S. 416 (1946); see also *Robbins v. Shelby County Taxing District*, 120 U.S. 489 (1887); *Best and Company v. Maxwell*, 311 U.S. 454 (1940).

Yet in citing this line of authority [and identifying with it the bus tax overturned in *Sprout v. South Bend*, 277 U.S. 163 (1928)], the appellants confront the salient

distinguishing feature: the taxes imposed by Act 685 of 1983 are special, not general, revenue levies and the law is clear that these kinds of legislatively-designated special use motor vehicles taxes are not violations of the Commerce Clause, even when they are *completely* flat rate fees.

The theoretical foundation for such legitimacy is that the tax is not levied on *actual use* of the roads, but upon the *privilege* of making such use. "The fee is for the privilege for a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed . . . One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he might." *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U.S. 285, 289 (1935).

In the case of *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950) decided four years after *Nippert, supra*, the Court was unanimous in its support of non-mileage based motor vehicle taxes. Following a lengthy review, the majority declared "it is clearly within the discretion of the State to determine whether the compensation for the use of its highways by automobiles shall be determined by way of a fee, payable annually, or by a toll based on mileage or otherwise". 339 U.S. 542, at 544-545. Even in the dissent (which revolved around the incidence of the tax being on a vehicle's purchase rather than a right to use the roads) Justice Frankfurter favorably reviewed the relevant case law:

> Again, if the State makes clear by disposition of the tax proceeds or by statutory declaration that the tax is levied to secure compensation for road use, the tax classification will be sustained if it may fairly be attributed to the privilege of road use, as distinguished from actual use. Compare *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183 (no allocation of proceeds) with *Clark v. Poor*, 724 U.S. 554 (allocation); see Appendix, post, p. 561. Thus, mileage may be ignored and an annual tax may be based on horsepower, *Hendrick v.*

> *Maryland*, 235 U.S. 160; on carrying capacity, *Clark v. Poor*, 274 U.S. 554, and *Hicklin v. Coney*, 290 U.S. 169; and on manufacturer's rated capacity, *Dixie Ohio Express Co. v. State Revenue Comm'n*, 306 U.S. 72. And the Court has upheld flat fees imposed without regard to size or weight factors, *Aero Mayflower Transit Co. v. Georgia, Public Service Comm'n*, 295 U.S. 285; *Morf v. Bingaman*, 298 U.S. 407; *Clark v. Paul Gray, Inc.*, 306 U.S. 583; *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U.S. 495.

339 U.S. at 551.

The Appellants now insist that this whole body of case law has been rendered moot *sub silentio* by the Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Of course, there is no inconsistency between the result in the *Capitol Greyhound, supra*, line of cases and the fourth prong of the *Brady* test when the "services provided by the State" are viewed as the *opportunity* to haul an unlimited number of miles. In any case, the Supreme Court has specifically reaffirmed the validity of these cases in a post-*Brady* decision. In *Massachusetts v. United States*, 435 U.S. 444 (1978) the Court validated a flat-rate federal airport tax by analogy to the "accepted" status of flat rate motor vehicle taxes:

> Having established that taxes that operate as user fees may constitutionally be applied to the States, we turn to consider the Commonwealth's argument that §4491 should not be treated as a user fee because the amount of the tax is a flat annual fee and hence is not directly related to the degree of use of the airways. This argument has been confronted and rejected in analogous contexts. *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 70 S.Ct. 806, 94 L.Ed. 1053 (1950), is illustrative. There the Court rejected an attack under the Commerce Clause on an annual Maryland highway tax of "2% upon the fair market value of motor vehicles used in interstate Commerce." The carrier argued that

the correlation between the tax and use was not sufficiently precise to sustain the tax as a valid user charge. Noting that the tax "should be judged by the result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted," id., at 545, 70 S.Ct., at 808, the Court rejected the carrier's argument:

> "Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with 'rough approximation rather than precision.' . . . Each additional factor adds to administrative burdens of enforcement, which fall alike on taxpayers and government. We have recognized that such burdens may be sufficient to justify states in ignoring even such a key factor as mileage, although the result may be a tax which on its face appears to bear with unequal weight upon different carriers. . . . Upon this type of reasoning rests our general rule that taxes like that of Maryland here are valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads." Id. at 546-547, 70 S.Ct., at 809 [Citations and footnotes omitted.]

See also, *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs.*, 332 U.S. 495, 68 S.Ct. 167, 92 L.Ed. 99 (1947).

430 U.S. 444, 463 (1978).

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), cited by the appellant, does contain dicta that *any* proportional tax meets the fourth prong of the *Complete Auto* test. Even this dicta however does not purport to reach as far as its converse, i.e. that no flat rate tax ever can meet this test. In any event, *Commonwealth Edison*, *supra*, explicitly limits the application of its analysis of the fourth prong of *Complete Auto* to general revenue taxes:

> The Montana Supreme Court held that the coal severance tax is "imposed for the general support of the government" 615 P.2d, at 856, and we have no reason to question this characterization of the Montana tax as a general revenue tax. Consequently, in reviewing appellant's contentions, we put to one side those cases in which the Court reviewed challenges to "user" fees or "taxes" that were designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services.

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 621 (1981).

In an effort to create some contemporary necessity for the Court to review this persuasive body of authority, the appellants claim that seven states *since 1980* have begun imposing this sort of "constitutionally suspect" tax. The truth is that some form of flat rate tax, usually in the form of a registration fee, has long been a fixture in the mix of highway taxes in every state in the Union. [4] Admittedly, under the International Registration Plan described above, the registration fees of thirty-three states are apportioned, but this is an apportionment based on the *percentage* of miles traveled in each jurisdiction the previous year. The resulting payment amount due each participating IRP state is in essence a flat rate fee: if 20% of an IRP apportioned carrier's mileage is in Arkansas it will pay Arkansas the same $209.00 [5] in an annual registration fee regardless of whether the actual number of miles generated in the state by the registering motor vehicle is 1,000 or 10,000.

Similarly the appellants press for review citing "a large volume of Commerce Clause litigation and inconsistent judicial decisions." (at 9). The truth is that only three State

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4 *Polk Motor Vehicle Registration Manual* (R.L. Polk Co. April, 1986)

5 $1044 x .20 = $208.80. See, Ark. Stat. Ann. §75-201 (C) (7) (Repl. 1979).

Supreme Courts have been confronted with the validity of facially non-discriminatory motor vehicle special revenue "user" taxes in which this sort of inherent disparity in cost per mile played a part in the analysis of the flat rate aspect of the challenged tax: the Maryland registration fee, Md. Transp. Code Ann §13-423(a) (1984); the Arkansas Highway Use Equalization Tax, Ark. Stat. Ann. §75-817.3 (Supp. 1985); and the Pennsylvania marker fee and axle tax, Pa. Cons. Stat. Ann. tit. 75 §§2102 (Purdon 1981) and 9901 et. seq. (Purdon Supp. 1986). In all three instances the courts *upheld* the tax relying upon that clear line of authority emanating from this Court in *Aero Mayflower Co. v. Georgia Public Serv. Comm'n*, 295 U.S. 285 (1935) through *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs.*, 332 U.S. 495 (1947) and *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950) culminating in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), and *Massachusetts v. United States*, 435 U.S. 444 (1978). See, *American Trucking Associations Inc., v. Goldstein*, 483 A.2d 47 (Md. 1984); *American Trucking Associations Inc., v. Gray*, 288 Ark. 488, 707 S.W.2d 259 (1986); *American Trucking Associations, Inc. v. Scheiner*, 509 A.2d 838 (Pa. 1986).

The only actual "inconsistent" decisions the appellants have cited are *American Trucking Associations, Inc. v. Conway*, 142 Vt. 17, 451 A.2d 42 (1982) (in which the appellants challenged a tax which on its face applied solely to non-Vermont registered vehicles) and *American Trucking Association Inc. v. Conway*, Vt. Super. Ct., Washington County (May 29, 1986), which merely grants a preliminary injunction, pending a trial on the merits, placing in escrow funds collected under a challenged flat rate fee which is facially non-discriminatory.

B. ***No Showing of Manifestly Disproportionate Amount.***

Throughout this litigation, the appellants have not even attempted to meet the established test for challenging

state imposed highway user fees. Such levies have been upheld "unless the amount is shown to be in excess of fair compensation for the *privilege* of using state roads". *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 546-547 (1950), cited in *Massachusetts v. United States*, 430 U.S. 444, 463 (1978) [emphasis added]. Moreover, the burden of asserting the requisite "manifest disproportion" clearly rests on anyone challenging the validity of the tax. *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 548 (1950).

No taxpayer is assessed more than $175.00 under the Arkansas HUE tax and since this challenge is really mounted on behalf of the mileage option payees, the actual dollars and cents charge being questioned is below that "high dollar" figure. Yet even $175.00 is well within the constant dollar amount of fees previously held valid by the Court. For example, the twenty five "1935 dollars" approved in *Areo Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U.S. 285 (1935) equates with $186.03 in 1983 dollars;[6] yet in 1935 the Georgia truck weight limit was only 12,500 pounds[7] compared to Arkansas' current 80,000 pounds. In short, the approved fee in 1935 was for more money and substantially less privilege. Similarly, in 1950 the Capitol Greyhounds Company challenged Maryland's levies of $505.17, $580.00, and $732.55[8]; an equivalent 1983 flat rate charge would have been $2,090.00, $2,400.00, and $1,542.00,[9] respectively.

6

The Consumer Price Index (1967 = 100) was 40.1 in 1935 and 298.4 in 1983. U.S. Dept. of Labor, *Handbook of Labor Statistics 1975-Reference Edition* and *Consumer Price Index U.S. City Average 1975-1986.*

7

Ga. L., 1931, (Ex. Sess.) p. 114.

8

Capitol Greyhound Lines v. Brice, 339 U.S. 542, 546 (1950).

9

The Consumer Price Index in 1950 was 72.1; in 1983 the CPI was 298.4.

Still, the record does reflect that the plaintiff/appellants may not have attempted to show "excessive" charges because they knew such proof could not be found.

Leroy Mallory, Director of Transportation for Tyler Pipe Industries (one of the name-plaintiff/appellants in this litigation) testified that the actual cost of operating one of his vehicles was $1.00/mile. [10] This is the only cost data in the record. In 1983 the Arkansas legislature raised its gross weight limit from 73,280 pounds to 80,000 pounds, which allowed truck carrying capacity to increase by 6500 pounds or some 14-16%. This percentage is computed by comparing the increase with the previous freight capacity of 43,000 pounds. [11] Since the HUE tax was imposed to pay for this increased weight limit, an (at most) 5% increase in costs/mile (assuming the nickle a mile option, the highest cost/mile paid by anyone) can not be considered excessive for a 14-16% increase in load capacity.

This favorable individual carrier cost/benefit analysis carries through on an industry wide basis.

Ralph Johnson, a transportation engineer and consultant who was called as a witness by the appellants themselves, had prepared a study, finding that in 1982 the industry benefit from an increase in allowable gross weight from 73,280 pounds to 80,000 in Arkansas would have

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Gray T. 1508.

11
Empty five axle vehicles weigh 28,000-31,000 pounds. Therefore, under the pre-1983 Arkansas weight limit of 73,280 pounds, freight capacity would have been around 43,000 pounds. *Gray*, T. 2308.

amounted to over $115 million a year. [12] Charles Venable, an engineer for the State, testified that the increased weight would result in an additional $53 million in needed repairs annually on Arkansas' interstate and primary system alone. [This was the damage figure relied upon by the trial court in setting the proposed bond on the request for a preliminary injunction. See, *American Trucking Association Inc. v. Gray*, 280 Ark. 258, 657 S.W.2d 207 (1983)]. The Highway Use Equalization Tax is designed to raise a little over $20 million a year. Thus, on an industry wide basis the funds to be raised are not disproportionate to either the private benefits secured or the public costs incurred.

The *structure* and *amount* of the tax (5 cents a mile to a maximum of $175.00) then is clearly within accepted Constitutional bounds.

C. *ATA Survey Not Probative of Unconstitutional Discrimination.*

In *American Trucking Associations v. Goldstein*, 483 A.2d 47 (Md. 1984), *American Trucking Associations v. Gray*, 709 S.W.2d 410 (Ark. 1986), and *American Trucking Associations v. Scheiner*, 509 A.2d 838 (Pa. 1986), three State Supreme Courts have assessed trial court records challenging facially non-discriminatory user taxes, the evidentiary centerpiece of which was an ad hoc "survey" of truckers' alleged costs per mile. In none of the three challenges did Appellate Courts find the survey data a persuasive indicator of unconstitutional discrimination.

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12 The actual reported savings was $115.8 million annually. DX.2. "Costs and Savings Associated with Changes In Weight Limits on Arkansas' Highways", Counseltrans Inc., (Rockville, Md. Oct. 1982) at 8. Ralph Johnson called by the appellants was author of the report and president of Counseltrans, Inc.

In this case the ATA survey purports to show something about the motor carriers' actual operating costs. An initial problem with the appellant's survey results, however, is that by isolating only the HUE portion of the taxes borne by heavy trucks in Arkansas, the survey is simply not probative of anything under an "actuality of operation" test. As this Court recently stated: "A state tax must be assessed in light of its actual effect considered *in conjunction with other provisions of a State's tax scheme.* 'In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.' [Citations omitted]" *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981). This need to look further than at a single tax is particularly pressing when the challenged Act itself (Act 685 of 1983) levied *both* the HUE tax and a registration fee on all motor vehicles with a declared gross weight in excess of 73,280 pounds. Ark. Stat. Ann. §§75-817.2, 75-817.3 (Supp. 1985).

Now, it is obvious that in actual operation, the IRP apportioned licensed fee (discussed in the appellees' Statement) is a boon to the heavy interstate hauler with a low percentage of Arkansas miles. Take, for example, four carriers, each hauling 5,000 miles in Arkansas. The first is a wholly intrastate carrier who pays $1,044.00 for his "J" tag, or around 20 cents/mile. The second is licensed under the IRP and travels 5,000 miles in Arkansas and 5,000 in another state he pays $522 to Arkansas for his license, or 10 cents/mile. The third is a coast-to-coast IRP carrier who travels 50,000 miles a year, 5,000 of which is in Arkansas he pays only $104 for his license fee or 2 cents/mile. The fourth is a non-IRP licensee who is licensed in a state with a reciprocity agreement in Arkansas and he pays absolutely no license fee in this state.

An example of the heavy interstate hauler is the plaintiff/appellant Transcon Lines Inc. who because of sheer

size is able to operate "pony express' style 24 hours a day from coast-to-coast. [13] Such a company can obviously churn out two or three times the miles (and therefore pay one half to one third of the registration fee per mile) of the hardest working owner/operator.

An auditor for the highway Department calculated the registration fee per mile for both Arkansas-based and non-Arkansas-based carriers appearing on the surveys chosen at random. She found a spread of between .84 to 19.88 cents per mile for the Arkansas base-registered carriers and between .55 to 1.8 cents per mile for the non-Arkansas base-registered trucks. Again, the survey data submitted by the appellants tells nothing about the total tax burden borne by the surveyed carriers and evidence *in the record* established that, without this information, the survey cannot be probative of the "actuality of operation".

There is a second conceptual problem with relevance of the information generated by the ATA survey.

The appellants in their Jurisdictional Statement refer to the survey data as drawing a distinction between "in state" and "out of state" trucks. (at 15). Such labeling is deceptive. Clearly the breakdown is not between "intrastate" and "interstate" commerce. Almost all carriers on *both* lists are interstate carriers. Of the 156 carriers on the Arkansas-based list, at least 138 had registered through the Arkansas IRP office and were therefore interstate operators. [14]

13

"The Buffalo driver takes his rest while the Indianapolis driver takes the same power unit hooked to the same trailer to Kirkland, Missouri where he would rest, the Kirkland driver takes it to Oklahoma City where he rests, and the Oklahoma City driver takes it to Tecumcari, New Mexico where he rests, the Tecumcari takes it to Winslow where he rests, the Winslow driver takes it to Barstow where he rests and then Barstow driver takes it to its ultimate destination, being Los Angeles." *Gray*, T. 1561.

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Gray, T. 1995.

In fact most of the vehicles on both surveys are base-registered on an apportioned basis under the International Registration Plan. The significance of this is that, under the liberal licensing criteria of IRP "base jurisdiction", where a vehicle is licensed is *no real indicator* of whether he is domestic or non-domestic for purposes of establishing parochial discrimination under the Interstate Commerce Clause. Many, if not most, IRP carriers operate in a multiplicity of jurisdictions and can and do conveniently register in several of them. Individual trucks may be base-plated in a state in which they never even travel. See, note 2.

The record in this case is full of examples of how fluid the situation is. For example, Mr. Paul Martinson testified that the Plaintiff Diamond Transportation System, Inc., is a Wisconsin Corporation with headquarters in Racine, Wisconsin, but licenses its vehicles in Oklahoma. Many carriers license some vehicles in Arkansas and some elsewhere, thus appearing on both lists. Even Arkansas Best Freight licenses its vehicles in Illinois. [15] Doug Hughes, the ATA official who coordinated the survey information, admitted that his lists ignore corporate citizenship and the probably more important indicator of "home office" domicile. The result, he said, is "Arkansas" companies which license in other states show up on the "foreign" list and foreign companies that license in Arkansas show up as Arkansas registrants. [16]

The law is clear that " . . . [o]ne of the fundamental principles of Commerce Clause jurisprudence is that no State consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to *local business.*' *Nothwestern States Portland Cement Co. v. Minnesota*, 358

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PX. 45-46.

16
Gray, T. 439.

U.S. 450, 458 (1959). See *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977)." *Maryland v. Louisiana*, 451 U.S. 725, 755 (1981). But the record in this case is clear that IRP registered interstate carriers may not be "local" (in that sense) anywhere. At the very least, the place where they base register has very little necessary connection with where that "locality" may be.

Moreover, whether a particular carrier is Arkansas base-registered or non-Arkansas base-registered makes absolutely no difference in the amount of Arkansas tax he will ever pay. This is uncontested by the appellants. Unlike the decision of where to locate a manufacturing plant in view of the West Virginia gross receipts tax credit [*Armco v. Hardesty*, 467 U.S. 638 (1984)], or where to ship exported goods under the New York franchise tax credit [*Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984)], or where to trade stock in view of the New York State transfer tax [*Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977)], the decision of where to base-register a motor vehicle in view of Act 685 of 1983 remains "tax neutral". Thus, in terms of those traditional commerce clause concepts guaranteeing "an area of free trade among the several states . . . " *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 402 (1984), the statistical claims propounded through the appellant's survey data are essentially irrelevant.

Finally, most of the raw data in the survey is unverifiable and therefore inadmissible hearsay. The information was gathered by special survey questionnaires prepared by the American Trucking Association solely for the purposes of this litigation. The responses generated were clearly out of court statements by unavailable declarants introduced for the truth of matter stated. Theoretically *some* of this information is of course verifiable in the state's IRP registration or motor fuel tax records available to the defendants. However, because IRP and motor fuel tax records report only gross *fleet* miles, without

regard to the declared gross weights of the vehicles comprising the fleet, three categories of responses would not be verifiable: the mileage claims of intrastate Arkansas carriers, the mileage claims of IRP carriers who did not qualify their whole fleets to haul in excess of 73,280 pounds, and the mileage claims of any "reciprocity" carrier who chose the annual option or did not register all vehicles in his fleet to carry in excess of 73,280 pounds.

Auditors for the Highway Department tried to determine the extent to which the survey information was capable of verification. On the Arkansas base-registered list the auditors could only find information on 59% of the carriers on the list and only verify half of that. On the non-Arkansas base-registered list a random 8% sample revealed so many discrepancies in either the number of miles or the number of trucks reported, or both, that the exercise was halted. [17] After establishing this foundation that such a high percentage of the information was from out of court statements not subject to verification, the defendants moved to strike the admission of the surveys as hearsay. The trial court overruled the objection indicating that the lack of verification from public records went to the weight rather than the admissibility of the evidence. [18]

D. *Existing Taxes*

At the conclusion of their Jurisdictional Statement (at 21-22) the appellants raise the "legislative" policy argument that the challenged tax is unnecessary and that existing motor fuel and registration taxes would provide adequate

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This attempt at verification is erroneously described by the appellants' Jurisdictional Statement as "a similar study by the appellees", at 9.n.2.

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Gray, T. 2066. A similar survey is accurately described by the Maryland Supreme Court as "an unvalidated informal survey". *American Trucking Associations, Inc. v. Goldstein*, 483 A.2d 47, 54 (Md. 1984).

state revenues. The doctrinal wedge for asserting this policy preference is the Court's familiar formulation for assessing state business regulations, not state taxes. A state economic regulation, which even-handedly effectuates a legitimate local purpose, will be upheld if the burden on commerce is incidental and not excessive in relation to the putative benefit. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The Court does not apply this balancing test to set state tax policy. All of the cases cited for this proposition in the appellant's statement at 21-22 involve business regulations. The only exception is *Continental Trailways, Inc. v. Director*, 509 A.2d 769 (1980), in which the New Jersey Supreme Court refused to apply the balancing test in an effort *by the State* to sustain a facially discriminatory levy.

This does, however, bring up a point bearing on the substantiality of the appellant's request for review: neither existing registration fees nor motor fuel taxes could meet the exacting level of review the appellants propose to utilize here. Both kinds of taxes are applied in all states. [19]

As noted above, registration fees are flat rate taxes, even registration fees that are apportioned through the International Registration Plan. Because the resulting fee is determined by the percentage of miles in a given jurisdiction, not the actual miles, the fee is merely a flat rate tax with inherently limited potential as a revenue raiser. (The political disincentive of raising registration fees on paper, say, $10.00 to get a $1.00 back in the State treasury is rather obvious). Moreover, as noted above, the apportioned registration is a subsidy of the "pony express" style company like the appellant Transcon, at the expense of a smaller, less flexible company or an owner/operator.

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19 *Polk Motor Vehicle Registration Manual*, (R.L. Polk Company, April, 1986).

The structural deficiency in motor fuel taxes is more subtle. The record in this case reflects a unanimous engineering judgment that motor vehicle wear and tear on the highways increases *at an increasing rate* as a motor vehicle's weight increases. [20] Yet motor fuel efficiency (a key determinant in the payment of any motor fuel tax) decreases *at a decreasing rate* as weight increases. The result is a subsidy of the highest weight category of vehicles by those which are lighter, a subsidy that will only increase with increasing reliance on the motor fuel tax in a state's mix of highway user fees. [21]

This discussion is not to suggest that all taxes, in all states, are Constitutionally suspect. It does point out that the question of what mix is needed is inherently a legislative choice and that it should not be made by considering one aspect of that mix in isolation, as was done by the appellants in the record here. The existing safeguards of *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950) met by Act 685 in this case, provide adequate protection for *both* state flexibility in raising road system revenues and the flow of national commerce that such a road system makes possible.

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Both the appellant's expert witness, Ralph Johnson and the appellee's witness, Assistant Chief Engineer Charles Venable concurred that this is the accepted significance among highway engineers of the empirical AASHTO road test.

21

U.S. Dept. of Transportation, *Vol. 1, Main Text State Highway Cost Allocation Guide*, (October, 1984), at III-11: "Fuel tax contributions per vehicle mile increase with vehicle weight because fuel efficiency declines with weight, but these contributions increase much less rapidly than responsibilities. Therefore a single rate fuel charge, planned to match the lightest vehicle's responsibility, would not achieve the correct revenues for the heavier vehicles."

CONCLUSION

The appellant's Jurisdictional Statement does not raise any substantial federal question and this appeal should be dismissed, or in the alternative, the judgment of the Arkansas Supreme Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served three copies of the foregoing Motion to Dismiss on Stephen M. Shapiro, 2000 Pennsylvania Avenue, N.W., Washington, D.C. 20006 and Daniel R. Barney, 2200 Mill Road, Alexandria, VA 22314-4654, by placing same in the U.S. Mail, First Class, Postage Prepaid, this 9th day of October, 1986. There are no other parties to the proceeding.

/s/ Chris Parker

APPENDIX

ARK. STAT. ANN.

75-131. Registration and certificate of title required.—It shall be a misdemeanor for any person to drive or move or for an owner knowingly to permit to be driven or moved upon any highway any vehicle of a type required to be registered hereunder which is not registered or for which a certificate of title has not been issued or applied for or for which the appropriate fee has not been paid when and as required hereunder, except that when application accompanied by proper fee has been made for registration and certificate of title for a vehicle it may be operated temporarily pending complete registration upon displaying a duplicate application duly verified or other evidence of such application or otherwise under rules and regulations promulgated by the commissioner.

75-250. Commission to make reciprocal agreements relating to operation of motor vehicles — Members.—An ex-officio Commission, composed of the Coimmissioner of Revenues, who shall serve as Chairman, the Director of Highways and the Chairman of the Public Service Commission [Arkansas Transportation Commission], is hereby established for the purpose of representing the State of Arkansas in the matter of making reciprocal agreements relating to the operation of motor vehicles.

75-251. Reciprocal agreements as to allocation and apportionment of registration pursuant to formula — Safety rules unaffected.— The Commission is hereby authorized to negotiate and consummate reciprocal agreements with the duly authorized officials or representatives of any state or the several states of the United States, whereby residents of such other state or states who operate commercial motor vehicles may allocate and apportion the registration of such commercial motor vehicles in accordance with any formula mutually agreed upon between the Commission and the

representatives or officials of such state or states. Provided, residents of this State are granted the same allocation and apportionment privileges for commercial motor vehicles' registration in such other state or states. Also provided, that nothing in this Act shall be construed as relieving any motor vehicle owner or operator from complying with all laws, rules and regulations pertaining to safety of operation of motor vehicles and the highway maximum weight standards and the preservation of the highways of this State.

75-809. Registration of vehicles—Weight limitation—Brakes—Display of registered gross weight—Operation with excess weight unlawful—Federal use tax payments.—(a) The commissioner, upon registering any vehicle under the laws of this state which vehicle is designed and used primarily for the transportation of property or for the transportation of 10 or more persons, may require such information and may make such investigation or test as necessary to enable him to determine whether such vehicle may safely be operated upon the highways in compliance with all the provisions of this Act. He shall register every such vehicle for a permissible gross weight not exceeding the limitation set forth in this Act. Every such vehicle shall be equipped with brakes as required in Section 124 [§ 75-724] of this Act.

(b) The Commissioner shall insert in the registration card issued for every such vehicle the gross weight for which it is registered, and if it is a motor vehicle to be used for propelling other vehicles he shall separately insert the total permissible gross weight of such motor vehicle and other vehicles to be propelled by it. He may also issue a special plate with such gross weight or weights stated thereon, which shall be attached to the vehicle and displayed thereon at all times. It shall be unlawful for any person to operate any vehicle or combination of vehicles of a gross weight in excess of that for which registered by the commissioner or in excess of the limitations set forth in this Act. Further, the Commissioner shall implement rules and

regulations issued by the United States Secretary of Transportation pertaining to federal use tax payments.

75-817. Single and tandem axle load limit . . .

(d) Subject to the limit upon the weight imposed upon the highway through any one (1) axle as set forth in subsections (a), (b) and (c) of this Section, no vehicle, or combination of vehicles, shall be operated upon the highways of this state when the gross weight is in excess of eighty thousand (80,000) pounds. Provided, that the foregoing maximum gross weights shall be applicable to vehicles, or combinations of vehicles, operated on highways in this state that are a part of the federal interstate highway system or that have been designated by the State Highway Commission as primary highways, and on all other highways in this state the maximum gross weight of any vehicles or combinations thereof shall not exceed sixty-four thousand (64,000) pounds. Provided, further, that vehicles, or any combination of vehicles, of a gross weight in excess of sixty-four thousand (64,000) pounds and not in excess of seventy-three thousand two hundred and eighty (73,280) pounds may operate upon the secondary highways of the State at a speed not in excess of forty (40) miles per hour. Vehicles, or any combination of vehicles, of a gross weight in excess of seventy-three thousand two hundred and eighty (73,280) pounds and not in excess of eighty thousand (80,000) pounds operating on the secondary highways of the state shall also be limited to a maximum speed of forty (40) miles per hour. Provided, that greater gross weights than permitted may be authorized by special permit issued by competent authority as authorized by law or lesser gross weights will be required when highways are posted.

75.817.3. Highways use equalization tax. . . .

(m) All fees, taxes, penalties and interest collected under the provisions of this Section of this Act not specifically classified as "Constitutional and Fiscal Agencies

Funds" shall be classified as "special revenues" and shall be deposited in the State Treasury, and the net amount thereof shall be transferred by the State Treasurer on the last business day of each month; 15% of the amount thereof, to the County Aid Fund; 15% of the amount thereof, to the Municipal Aid Fund; and 70% of the amount thereof, to the State Highway Department Fund, such funds to be further disbursed in the same manner and used for the same purposes as is set out in the "Arkansas Highway Revenue Distribution Law."

MOTION FILED
OCT 15 1986

(3)

No. 86-358

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants,
v.
HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
Appellees.

On Appeal from the Supreme Court of Arkansas

MOTION OF YELLOW FREIGHT SYSTEM, INC., NORTH AMERICAN VAN LINES, INC., AND B. I. TRANSPORTATION, INC. FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AS AMICI CURIAE IN SUPPORT OF APPELLANTS' REQUEST THAT PROBABLE JURISDICTION BE NOTED

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MOTION OF YELLOW FREIGHT SYSTEM, INC., NORTH AMERICAN VAN LINES, INC., AND B. I. TRANSPORTATION, INC. FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 42 of the Rules of this Court, Yellow Freight System, Inc. ("Yellow"), North American Van Lines, Inc. ("North American"), and B. I. Transportation, Inc. ("B. I.") respectfully move for leave to file the accompanying brief as *amici curiae*. Appellants have consented to the filing of this brief; appellees have not.

INTEREST OF YELLOW, NORTH AMERICAN, AND B. I.

This appeal presents the question whether state highway use taxes that impose a substantially higher effective tax rate on trucks registered outside the taxing State than on trucks registered in it discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution. The three interstate motor carriers seeking to file the accompanying brief as *amici curiae* are subject to the challenged tax—Arkansas' annual $175-per-truck/5¢-per-mile highway use equalization tax—and to similar highway use taxes imposed by other states. As a victim of the discrimination inflicted by these taxes, each carrier has a direct and substantial interest in this appeal.

This Court has long held that in reviewing a Commerce Clause challenge to a state tax, it is "not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts [that] are our concern." *Nippert v. Richmond*, 327 U.S. 416, 431 (1946). Yellow, North American, and B. I. have firsthand experience with the practical effects of discriminatory state highway taxes, and can describe in concrete dollars and cents terms the cumulative burden imposed by such taxes on interstate motor carriers. The continuing spread of non-mileage proportioned highway taxes (adopted by seven states since 1980) and their discriminatory impact on thousands of interstate motor carriers warrants this Court granting full review of the issues raised in this appeal.

Yellow, North American, and B. I. therefore move for leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

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October 15, 1986

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-358

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants,

v.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
Appellees.

On Appeal from the Supreme Court of Arkansas

BRIEF OF YELLOW FREIGHT SYSTEM, INC., NORTH AMERICAN VAN LINES, INC., AND B. I. TRANSPORTATION, INC., AMICI CURIAE, IN SUPPORT OF APPELLANTS' REQUEST THAT PROBABLE JURISDICTION BE NOTED

Pursuant to Rule 36 of the Rules of this Court, Yellow Freight System, Inc., North American Van Lines, Inc., and B. I. Transportation, Inc. respectfully submit this brief as *amici curiae* in support of appellants' request that probable jurisdiction be noted.

INTEREST OF THE AMICI CURIAE

The interest of Yellow, North American, and B. I. in this matter is set forth in the accompanying Motion for Leave to File Brief as Amici Curiae.

STATEMENT

The Arkansas highway use equalization ("HUE") tax and similar discriminatory taxes imposed by other states adversely affect the entire interstate motor carrier industry. That industry comprises hundreds of thousands of businesses, ranging from single truck owner-operators to major companies that operate several thousand trucks each. Trucking firms are either "for-hire" carriers or "private" carriers. For-hire carriers transport other people's freight for compensation, while private carriers (manufacturers, merchants, and others) transport their own goods. Together, the two types of carriers utilize over 1.5 million trucks to haul goods approximately 46.5 billion miles interstate each year.[1] Truck transportation is critical to almost every other line of interstate commerce, and ultimately to the livelihoods and leisure activities of virtually all Americans.

The three interstate carrier *amici* represent a cross-section of this major industry. *Amicus* Yellow Freight System, Inc. ("Yellow"), based in Overland Park, Kansas, is one of the largest of the over 32,000 interstate for-hire motor carriers regulated by the Interstate Commerce Commission ("ICC"). 1984 I.C.C. Ann. Rep. Appendix E, Table 1. Yellow transports less-than-truckload shipments of general commodities throughout the United States and parts of Canada using 533 terminals (points of consolidation and distribution). In 1985, Yellow employed over 3,000 trucks to haul freight some 417 million miles interstate. Yellow Freight System, Inc., 1985 Annual Report M to the ICC, Schedule 720, Line 11b; Schedule 730, Line 6b.

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[1] The U.S. Department of Commerce Bureau of the Census' 1982 CENSUS OF TRANSPORTATION, TRUCK INVENTORY & USE SURVEY indicates that for-hire carriers annually operate approximately 650,000 trucks in nearly 30 billion miles of interstate operations (p. 8, Table 2) while private carriers annually operate approximately 800,000 trucks (p. 33, Table 6) in over 16.5 billion miles of long range transportation (p. 90, Table 12).

Amicus North American Van Lines, Inc. ("NAVL"), headquartered in Fort Wayne, Indiana, is a leading household goods carrier (moving company), as well as a regulated common carrier of general commodities. NAVL is thus representative of both specialty carriers (including tank truck carriers, automobile transporters, and others) and general freight carriers. NAVL's household goods division operates approximately 1,500 leased truck tractors throughout the country. Together with NAVL's general freight fleet, these trucks travel approximately 403 million miles in interstate commerce annually. North American Van Lines, Inc., 1985 Annual Report M to the ICC, Schedule 720, Line 11b; Schedule 722, Line 22.

Amicus B. I. Transportation, Inc. ("B. I."), based in Burlington, North Carolina, is the transportation arm of Burlington Industries, a major textile manufacturer. Utilizing approximately 345 trucks, B. I. transports Burlington's products nationwide. Its fleet travels approximately 41.5 million interstate miles annually. B. I. is representative of the nation's over 119,000 private motor carriers. *See* C. A. TAFT, COMMERCIAL MOTOR TRANSPORTATION 7 (1986). Those carriers use over 800,000 trucks to conduct more than 16.5 billion miles of long range operations annually. *See* Footnote 1, *supra.*

Competition in the interstate trucking industry has increased significantly since passage of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793-826. Over 12,000 new interstate operations have been granted broad, unencumbered authority by the ICC. 1984 I.C.C. Ann. Rep. 50. The ICC has noted that there is now "vigorous price competition in the trucking industry" (*see Lawfulness of Volume Discount Rates—Motor Common Carrier of Property*, 365 I.C.C. 711, 714 (1982)), which greatly limits carriers' ability to set rates high enough to offset discriminatory state taxes.. In fact, the trucking industry's net income every year since 1978 has been below 3 percent of operating revenues, and in 1985, 33

percent of the carriers operated at a loss. AMERICAN TRUCKING ASSOCIATIONS, INC., FINANCIAL & OPERATING STATISTICS, MOTOR CARRIER ANNUAL REPORT (1978-85 eds.) [based on carriers' Annual Reports M filed with the ICC], Summary Table I, Column 7; Section I-IV, Line 45—Net Carrier Operating Income.

The competitive impact of discriminatory state taxes such as the Arkansas HUE tax—both in terms of competition with locally based carriers and in terms of intermodal competition in the long haul freight business—is a matter of grave concern. In the highly competitive environment in which they operate, interstate motor carriers are especially vulnerable to increased costs resulting from discriminatory taxes. Competition also requires flexibility and deference to customer needs. Because the vagaries of demand make it extremely difficult for carriers to predict where trucks will be needed or what routes they will have to take, it is virtually impossible for interstate carriers to control their level of highway use in any one state in an effort to avoid or mitigate the impact of such taxes.

In these circumstances, interstate motor carriers of all kinds have no choice but to pay the discriminatory highway taxes that an increasing number of states are exacting. Vigorous enforcement of the Commerce Clause, as in the present challenge, represents the carriers' only potential salvation from these costly, unconstitutional state taxes.

ARGUMENT

I. ARKANSAS' HIGHWAY USE EQUALIZATION TAX IMPOSES A PER-MILE COST ON OUT-OF-STATE MOTOR CARRIERS SEVERAL TIMES THE COST IT IMPOSES ON THEIR IN-STATE COMPETITORS.

Appellants challenge the validity under the Commerce Clause of Arkansas' HUE tax, an annual $175-per-truck/5¢-per-mile highway tax. On its face, the HUE tax applies both to trucks registered in Arkansas and to trucks registered outside the State. However, this Court has consistently held that in reviewing a Commerce Clause challenge to a state tax, "[t]he principal focus must be the *practical operation* of the statute, since the validity of state laws must be judged chiefly in terms of their *probable effects*." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980) (emphasis added). The practical effects of the HUE tax and other highway use taxes can be determined by examining the relative costs per mile traveled in the taxing state for out-of-state, versus in-state, motor carriers. As discussed below, under such an analysis, the HUE tax discriminates heavily in favor of locally based carriers and therefore violates the Commerce Clause.

Record evidence from Arkansas' own tax records shows that, on a classwide basis, the HUE tax imposes a far higher cost per mile on trucks registered outside Arkansas than on trucks registered in the State. (J.S. 4) To determine whether the tax discriminates against the carrier *amici* individually, each has compared its own tax cost per mile (for its fleet of trucks registered outside Arkansas) with the tax cost per mile for the average Arkansas-registered motor carrier. The *amici* performed the same comparison for Pennsylvania's former $25-per-truck marker fee and current $36-per-axle tax, both of which are under Commerce Clause challenge in a contemporane-

ous appeal.[2] *American Trucking Associations, Inc. v. Scheiner*, 55 U.S.L.W. 3175 (U.S., appeal docketed Sept. 3, 1986) (No. 86-357).

Table I below presents these comparisons, and demonstrates the blatantly discriminatory impact of the Arkansas and Pennsylvania taxes.[3] The tax cost-per-mile differentials set forth in Table I add up quickly to huge dollar amounts of discrimination. Table II shows how much excess tax the carrier *amici* are compelled to pay as a result of the non-mileage proportioned highway taxes under challenge in this appeal and *Scheiner*.

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[2] The "average tax cost per mile" figures for the Arkansas-registered and Pennsylvania-registered carriers, set forth in Table I *infra*, are derived from statistical evidence in this case (PX 38: Arkansas-registered trucks averaged 17,770 miles in-state during calendar year 1982, a figure which, when divided into the annual HUE tax of $175 per truck, yields a tax cost per mile of approximately 1.0¢) and in appellants' contemporaneous challenge to two Pennsylvania highway taxes. *American Trucking Associations v. Scheiner*, 509 A.2d 838 (Pa.), *appeal docketed* (U.S., filed Sept. 3, 1986) (No. 86-357) (Pennsylvania-registered trucks averaged 25,857 miles in-state during calendar year 1981 (PX 12), a figure which, when divided into the annual marker fee of $25 per truck, yields a tax cost per mile of 0.10 cents and, when divided into the annual axle tax of $180-per-(5-axle) truck, yields a tax cost per mile of 0.70 cents).

[3] The data in Table I for Yellow Freight, North American Van Lines, and B. I. Transportation were computed on the basis of taxes paid in Arkansas for the tax year ended June 30, 1985, and in Pennsylvania for the tax year ended March 31, 1983 (marker fee) and March 31, 1985 (axle tax).

TABLE I—*Level of Discrimination*

A Comparison of Interstate Motor Carrier Amici's Tax Cost Per Mile With That of Carriers Registered in the Taxing State

STATE	ARKANSAS	PENNSYLVANIA	PENNSYLVANIA
Type and Amount of Tax	$175 HUE Tax	$25 Marker Fee	$36 Per Axle Tax
CARRIERS REGISTERED IN TAXING STATE			
Average Tax Cost Per Mile	1.00 cents	0.10 cents	0.70 cents
YELLOW FREIGHT SYSTEM			
Tax Paid	$293,094	$53,975	$630,516
In-State Miles Traveled	5,861,881	21,513,335	35,154,130
Tax Cost Per Mile	5.0 cents	0.25 cents	1.79 cents
Ratio to In-State Carrier's Tax Cost	**5 to 1**	**2.5 to 1**	**2.6 to 1**
NO. AMERICAN VAN LINES			
Tax Paid	$387,669	$157,675	$867,810
In-State Miles Traveled	7,753,380	N/A	26,549,633
Tax Cost Per Mile	5.0 cents	N/A	3.27 cents
Ratio to In-State Carrier's Tax Cost	**5 to 1**	**N/A**	**4.7 to 1**
B. I. TRANSPORTATION			
Tax Paid	$14,700	$9,300	$31,221
In-State Miles Traveled	823,662	763,182	999,446
Tax Cost Per Mile	1.78 cents	1.22 cents	3.12 cents
Ratio to In-State Carrier's Tax Cost	**1.8 to 1**	**12.2 to 1**	**4.5 to 1**

TABLE II—*Cost of Discrimination*

A Projection of Amici's Tax Liability at Average Cost Per Mile Paid
by In-State Registered Carriers and a Calculation of Excess Tax Paid

State & Tax	Ark. HUE Tax	Pa. Marker Fee	Pa. Axle Tax
Tax Cost Per Mile	1.00 cents	0.10 cents	0.70 cents
YELLOW FREIGHT SYSTEM			
Tax Paid	$293,094	$ 53,975	$630,516
Tax Due At In-State Cost Per Mile	$ 58,619	$ 21,513	$246,079
Excess Tax Paid	**$234,475**	**$ 32,462**	**$384,437**
NO. AMERICAN VAN LINES			
Tax Paid	$387,669	$157,675	$867,810
Tax Due At In-State Cost Per Mile	$ 77,534	N/A	$185,847
Excess Tax Paid	**$310,135**	**N/A**	**$681,963**
B. I. TRANSPORTATION			
Tax Paid	$ 14,700	$ 9,300	$ 31,221
Tax Due At In-State Cost Per Mile	$ 8,237	$ 763	$ 6,996
Excess Tax Paid	**$ 6,463**	**$ 8,537**	**$ 24,225**

As Table I demonstrates, the interstate carrier *amici* are being forced to pay effective tax rates of 1.8 to 12.2 times their in-state counterparts'. As depicted in Table II, this rate differential results in the *amici* paying hundreds of thousands of dollars in excess taxes.[4]

The burden associated with each state's discriminatory highway tax is exacerbated when such taxes are levied by many states. "[I]f [Arkansas] can impose such burdens, so can every other State," thereby compounding "the resulting impediments on the free conduct of . . . interstate business." *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 759 (1967). *See also Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984) (a state tax must be such that "if applied by every jurisdiction, there would be no impermissible interference with free trade"); *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 557 (1950) (Frankfurter, J., dissenting) ("an interstate carrier will be subject to privilege taxes of several states, even though his entire use of the highways is not significantly greater than that of intrastate operators").

Already, seven states levy some form of annual non-mileage proportioned highway tax: Arkansas ($175 per truck), Indiana ($50 per truck), Kentucky ($150 per truck), Maryland ($25 per truck), New Jersey ($25 per truck), Pennsylvania ($36 per axle, amounting to $180 per truck for most interstate vehicles), and Vermont

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[4] *Amici* recognize that if Arkansas and Pennsylvania sought to raise the same amount of revenue by a non-discriminatory tax proportioned to highway use rather than by their existing discriminatory taxes, the uniform tax cost per mile would be somewhere between the high rate now paid by trucks registered outside those states and the low rate paid by the in-state carriers. The savings to *amici* from such a revenue-neutral, non-discriminatory tax, while substantial, would be somewhat less than the amounts shown in Table II. The figures in that Table, however, are revealing in that they reflect the magnitude of the disadvantage suffered by *amici* compared to their Arkansas-registered and Pennsylvania-registered competitors.

($50 per truck).[5] The potential burden on interstate commerce from the spread of these discriminatory state taxes is staggering. *Amici* Yellow, North American, and Burlington all engage in nationwide operations, and thus are vulnerable to discriminatory impositions by all 48 contiguous states and the District of Columbia. If all 49 jurisdictions levied taxes like Arkansas' HUE tax, and the *amici* had the same level of operations in each jurisdiction as they have in Arkansas, Yellow would face over $11.4 million in excess taxation, North American over $15.1 million, and Burlington over $300,000.

When the challenged taxes' discriminatory effects are extrapolated to the interstate trucking industry as a whole, the burdening of interstate commerce is enormous. In view of the potentially grave adverse effects on interstate commerce of parochial legislation such as the Arkansas HUE tax and the Pennsylvania axle tax and marker fee, this Court should give plenary consideration to the issues raised by ATA's appeals.

II. FUEL TAXES—A NON-DISCRIMINATORY FORM OF STATE HIGHWAY TAXATION—PROVIDE A READY ALTERNATIVE TO TAXES NOT PROPORTIONED TO MILEAGE.

The discrimination suffered by interstate carriers is all the more egregious because Arkansas and Pennsylvania could easily avail themselves of an alternative method of highway taxation that is proportioned to each carrier's actual miles traveled in the state. All states, including Arkansas and Pennsylvania, already levy fuel sales and use taxes that are directly related to a taxpay-

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[5] Ark. Stat. Ann. §§ 75-817.2, 75-817.3(a)(3), (4) and (5) (Supp. 1985). Ind. Code Ann. § 6-6-8 (Burns Supp. 1986); Ky. Rev. Stat. Ann. § 138.660(4)-(7) (Supp. 1986); Md. Transp. Code Ann. § 13-423(a) (1984); N.J. Stat. Ann. § 54.39 A-10 (West Supp. 1986); Pa. Cons. Stat. Ann. tit. 75 § 2102 (Purdon 1981); Pa. Cons. Stat. Ann. tit. 75, § 9901 *et seq.* (Purdon Supp. 1986); Vt. Stat. Ann. tit. 23, §§ 415, 3007, 3010 (1978 and Supp. 1985), *as amended by* 1985 (Adj. Sess.), No. 124 (1986).

er's level of highway use.[6] If maintenance requirements justify a rise in Arkansas' or Pennsylvania's highway tax revenues, those states could simply increase their existing fuel taxes. Given the availability of this constitutionally valid alternative, there is no justification for the discriminatory taxes under challenge here and in *Scheiner*. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (a state action violates the Commerce Clause where "the local interest" [here, the raising of highway tax revenues] "could be promoted as well with a lesser impact on interstate activities").

CONCLUSION

To halt the states' harmful attempts to protect local interests and export their highway tax obligations, this Court should note probable jurisdiction in this appeal and *Scheiner*, and strike down the challenged taxes under the Commerce Clause.

Respectfully submitted,

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October 15, 1986

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[6] *See* Ark. Stat. Ann. §§ 75-1106, 75-1150, 75-1241, 75-1251, 75-1269 (Repl. 1979); 75-1278 (Supp. 1985) and 72 Pa. Cons. Stat. Ann. §§ 2611a *et seq.*, 2614.1 *et seq.*, 2617.1 *et seq.* (Purdon 1964). The more miles a truck is driven in a state, the more gallons of fuel it consumes and the more tax is paid on the fuel. Pennsylvania also apportions its corporate income tax, when levied on interstate carriers, according to the carrier's total miles traveled in the state. *See* 72 Pa. Cons. Stat. Ann. § 7401(3)2(b) (Purdon Supp. 1986).

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Appellees

On Appeal from the Supreme Court of Arkansas

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Appellees

On Appeal from the Supreme Court of Arkansas

REPLY BRIEF FOR THE APPELLANTS

The Arkansas Highway Use Equalization (HUE) tax imposes an effective tax rate that is three to five times higher for trucks registered outside the State than for those registered in the State. The Jurisdictional Statement demonstrated that this tax violates the Commerce Clause because it discriminates against out-of-state trucks and is not fairly related to the services provided by the State—use of the highways—for which the tax is levied.

Appellees fail to come to grips with these defects. Indeed, they concede that flat taxes "will inevitably result in different payments per mile based upon the number of miles traveled in the taxing jurisdiction" and thus involve an "inherent disparity in cost per mile" (Mot. to Dis. 7, 12). Moreover, they do not dispute that such discrimination was the intended effect of the Arkansas statute. Nor do they contest that the ever-increasing number of local preferences and retaliatory countermeasures that states have recently adopted in the highway tax area represent precisely the sort of trade war that the Commerce Clause was designed to prohibit. Finally, appellees acknowledge that the Vermont courts

have issued decisions "inconsistent" with the decision below.

Nevertheless, appellees assert that this appeal involves no substantial constitutional question. Appellees' arguments obscure but do not refute the compelling reasons supporting plenary review of the Commerce Clause issue presented here.

1. Appellees initially emphasize (Mot. to Dis. 6-7) that the HUE tax is neutral on its face and applicable to both in-state and out-of-state trucks. But that fact is entirely beside the point. It is well established that the Commerce Clause condemns a facially neutral tax that is discriminatory in effect. See J.S. 11-12 & n.5.

In seeking to uphold the tax notwithstanding its disparate impact, appellees, like the Arkansas Supreme Court, place sole reliance on the *Aero Mayflower* line of cases first decided by this Court more than 50 years ago. However, appellees do not attempt to square those rulings with this Court's modern Commerce Clause jurisprudence or to justify application of the rulings to the interstate trucking industry of the 1980s. As demonstrated in the Jurisdictional Statement (at 22-26), the *Aero Mayflower* line of cases was grounded in the circumstances, both legal and factual, of an earlier day. Contrary to appellees' approach, those decisions cannot be viewed in isolation or mechanically invoked without further thought; rather, they must be harmonized with contemporary Commerce Clause principles.

Following the reasoning of *Aero Mayflower*, appellees assert (Mot. to Dis. 8 (emphasis in original)) that the HUE tax "is not levied on *actual use* of the roads, but upon the *privilege* of making such use," and that, as a privilege tax, it is consistent with the Commerce Clause. But the Court's recent Commerce Clause cases have firmly rejected this kind of formalistic approach. See J.S. 24, 26. "There is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely

obscures the question whether the tax produces a forbidden effect." *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288 (1977).

Appellees also repeat the shibboleth that an out-of-state trucker who is given the " 'privilege [to use a state's highways] without limit is not wronged by his own refusal to enjoy it as freely as he might' " (Mot. to Dis. 8, quoting *Aero Mayflower Transit Co.* v. *Georgia Public Serv. Comm'n*, 295 U.S. 285, 289 (1935)). As discussed in the Jurisdictional Statement (at 25), such a view ignores the realities of the modern interstate trucking industry. To say that an interstate trucker whose business takes him to many states "refus[es]" to drive more miles in Arkansas is specious; an interstate truck can be in only one state at a time, and its route is governed by the demands of its shippers. Furthermore, as an increasing number of states adopt flat highway taxes, each certainly cannot justify its levy on the theory that trucks should spend more time in that state and less in others.

In the end, the *Aero Mayflower* line of cases can no longer be reconciled with either prevailing constitutional doctrine or common sense. Flat highway taxes work to favor intrastate over interstate commerce and locally-based over out-of-state trucks. That is discrimination pure and simple, and such local favoritism offends the central purpose of the Commerce Clause. As shown by the increasing number of states that recently have passed flat highway taxes, the time has come for the Court to so hold.

2. a. Appellees try to avoid the need for plenary review by arguing (Mot. to Dis. 9-10, 12) that the Court recently adhered to the *Aero Mayflower* line of decisions in *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), and *Massachusetts* v. *United States*, 435 U.S. 444 (1978). However, those cases did not involve a challenge to the constitutionality of flat taxes under the Commerce Clause, and they referred to the *Aero Mayflower* decisions only by way of

analogy. Moreover, in neither case was it shown that the challenged tax discriminated between in-state and out-of-state taxpayers. Finally, in neither *Evansville* nor *Massachusetts* was the Court asked, as it is here, to reconsider the authority of *Aero Mayflower* in order to bring it into accord with more recent legal and factual developments.

The fee at issue in *Evansville* was not a flat tax but instead was imposed on airline passengers each time they used the airport. Indeed, the Court in *Evansville* specifically noted that the fee did not "discriminate[] against interstate commerce" and that "there is no showing of any inherent difference between these two classes of flights [interstate and intrastate], such that the application of the same fee to both would amount to discrimination against one or the other" (405 U.S. at 717, citing *Nippert* v. *Richmond*, 327 U.S. 416 (1946)). Such a fee is exactly the kind of levy that, in contrast to the Arkansas HUE tax, operates to treat all users equally and is proportionate to the governmental services provided.

Massachusetts did not concern the Commerce Clause at all but rather the implied immunity of states from a federal flat tax on aircraft. Because the tax was imposed by the United States, *Massachusetts* did not present the problem raised here of one taxing authority acting to discriminate in favor of its own taxpayers and against others. And in contrast to *Massachusetts*, where the Court found that there was no danger that the federal government would single out states for unfavorable treatment, there *is* a distinct danger, and one that is rapidly coming to pass, that states will use flat highway taxes to place a disproportionate burden on out-of-state taxpayers. See J.S. 8, 12. In addition, because there was only a single taxing authority, *Massachusetts* did not present the problem of cumulative burden caused by adoption of flat taxes in a number of states.

b. Appellees also suggest (Mot. to Dis. 10-11, 12-13) that the non-discrimination and proportionality requirements of *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. at 279, are limited to general revenue taxes and do not apply to so-called "user" taxes. They rely on the passage in *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 621 (1981), where the Court, in considering the validity of a general revenue coal severance tax, "put to one side" those cases in which the Court reviewed challenges to user fees or taxes.

Contrary to appellees' suggestion, the Court's user tax decisions have consistently recognized the applicability of the basic Commerce Clause prohibition against discrimination, including, in the 1972 *Evansville* case, *Nippert*'s teaching that flat taxes, even if facially neutral, violate the Commerce Clause because they are not proportioned to out-of-state firms' typically lesser presence in the taxing state. See, *e.g.*, *Evansville*, 405 U.S. at 717 (citing *Nippert, supra*); *Interstate Transit, Inc.* v. *Lindsey*, 283 U.S. 183, 186, 190 (1931). Moreover, the footnote in *Commonwealth Edison* immediately following the above-quoted language makes clear that user taxes are subject not to a *lesser* standard than other state taxes but instead to the *additional* requirement that their amount not be "manifestly disproportionate to the services rendered" (453 U.S. at 622 n.12 (citations omitted)).[1]

Accordingly, *Commonwealth Edison* contradicts, rather than supports, appellees' assertion that the *Complete Auto*

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[1] The *Commonwealth Edison* footnote begins with a quotation from the same paragraph of the *Interstate Transit* opinion in which the Court recognized that, to be deemed a valid highway user tax and not a forbidden tax on the privilege of engaging in interstate commerce, a tax had to be (1) proportional to interstate vehicles' "extent or manner of use" of the state's highways, (2) not discriminatory, *and* (3) not "unreasonably large." 283 U.S. at 190. Justice Brandeis, writing for the Court, concluded that it was not necessary to reach the nondiscrimination or excessiveness requirements because the challenged tax (levied on interstate buses' carrying capacity) "[did] not rise with an increase in mileage traveled" or otherwise meet the proportionality requirement. *Ibid.*

standard has no application to user charges. As the Court explained only a few weeks before the *Commonwealth Edison* decision, "*no* state tax may be sustained" unless it satisfies the *Complete Auto* test. *Maryland* v. *Louisiana*, 451 U.S. 725, 754 (1981) (emphasis added).

3. a. Having failed to sustain the Arkansas HUE tax on legal grounds, appellees go to considerable lengths (Mot. to Dis. 15-20) to contest the probativeness and reliability of appellants' showing of the discriminatory effect of the tax on out-of-state trucks. The short answer to the State's contention is that the Arkansas Supreme Court accepted the existence of a discriminatory effect for purposes of its decision but nonetheless held, as a matter of law, that the discrimination did not violate the Commerce Clause. The validity of that *legal* holding is the question presented to this Court for review. Appellees do not answer that question by renewing their argument, which was not accepted by either court below, that no discrimination was in fact established.

In any event, appellees' exceptions are without merit. Their principal submission is that, because trucks legally are free to register in any one of a number of states, the state of registration "is no real indicator of whether [the truck] is domestic or non-domestic for purposes of establishing parochial discrimination under the Interstate Commerce Clause" (Mot. to Dis. 18 (emphasis omitted)). In practice, however, trucks generally do register in a state based on their operations and ownership there. If a state sought to discriminate against out-of-state trucks, imposing a tax on the basis of the place of registration would provide an effective means for doing so. Indeed, a number of courts have held that taxes based on state of registration discriminate between in-state and out-of-state enterprises (see J.S. 9-10).[2]

[2] It also is significant that the Arkansas legislature has enacted a statute to provide reimbursement for retaliatory taxes that other states impose on *Arkansas-registered* trucks in response to the

b. Appellees suggest (Mot. to Dis. 17) that, because some Arkansas-registered trucks are part of interstate commerce, the HUE tax does not violate the Commerce Clause. But the Commerce Clause does not permit a state to favor a local company over an out-of-state business simply because both are engaged in interstate commerce. See *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 355 (1977). Similarly, it is irrelevant that the Arkansas HUE tax does not discriminate against out-of-state vehicles with surgical precision—*i.e.*, that a small proportion of Arkansas-registered trucks (the 1.6% that drive fewer than 3500 miles per year) are not benefited, while some non-Arkansas-registered trucks (the 24.2% that annually travel more than 3500 miles in Arkansas) are not disadvantaged (or not disadvantaged as much). A tax that generally discriminates in favor of in-state over out-of-state taxpayers is not saved simply because some of the former are not helped or some of the latter are not harmed. See *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27, 40, 42-43 (1980); *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 354 n. 4 (1951).

These principles are an integral element of the holdings in the "drummer tax" cases. See J.S. 12-14. In *Nippert* v. *Richmond*, *supra*, for example, the activities of both the out-of-state solicitor and his in-state competitor undoubtedly involved interstate commerce. Moreover, the challenged Richmond tax applied not only to out-of-state solicitors but also to Virginia companies without a fixed place of business in the city. Despite the fact that the tax did not discriminate between interstate and intrastate commerce, and despite the fact that the municipal tax could disadvantage some Virginia solicitors

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Arkansas HUE tax. See J.S. 19-20; Ark. Stat. Ann. §§ 75-817.4-75-817.5 (Supp. 1985) (J.S. App. 41a) Arkansas' willingness to expend state funds to reimburse the owners of such trucks is convincing proof that in-state registration is indicative of in-state ownership.

along with out-of-state solicitors, the Court held that the general discrimination in favor of local over out-of-state businesses violated the Commerce Clause (327 U.S. at 431-432):

> It is true that the tax may strike as heavily upon some Virginia solicitors, and even upon some who confine themselves to Richmond, as it does upon others who come periodically or otherwise from Washington, New York or Cedar Rapids. And it may bear upon a few of the former more heavily than upon most of the latter. But neither consequence is the more probable one for the larger number of cases. The strong likelihood is the other way.

See also, *e.g.*, *Halliburton Oil Well Co.* v. *Reily*, 373 U.S. 64, 69 (1963).

c. Appellees distort the operation of the International Registration Plan ("IRP") in an attempt to show that out-of-state carriers pay a lower per-mile registration fee to Arkansas than in-state carriers and that such disparity can offset the discriminatory impact of the HUE tax (Mot. to Dis. 16-17). Appellees' argument is flawed on two grounds. First, it is improper to consider the registration fee and the HUE tax together because, for the reasons discussed in ATA's Jurisdictional Statement (at 20-24) and Reply Brief (at 5-6) in the companion case of *American Trucking Associations, Inc.* v. *Scheiner*, appeal docketed, No. 86-357 (U.S. Sept. 3, 1986), the compensatory tax doctrine has no application here.

Second, appellees' manipulation of the IRP formula is misleading and unrealistic. Appellees offer a hypothetical (Mot. to Dis. 16) that assumes that Arkansas-registered and non-Arkansas-registered trucks travel the same number of miles in Arkansas but travel widely divergent numbers of total miles. In fact, the record plainly establishes that Arkansas-registered trucks average many times more miles in the State annually than non-Arkansas-registered trucks (PX 38, 40, 46, 64) and that the typical truck subject to the HUE tax averages 70,000 miles annually in

all states combined (PX 52). Accordingly, the proper comparison of IRP costs is among trucks with the same annual mileage in all states combined, but different annual mileages in Arkansas. Under such a comparison, all IRP vehicles have an *identical* Arkansas registration fee per mile regardless of their respective mileages in Arkansas.[3]

4. Finally, appellees raise (Mot. to Dis. 20-22) the hobgoblin of administrative convenience. In their view, repudiation of the *Aero Mayflower* line of cases would hamstring state taxation of freight carriers.

The Jurisdictional Statement demonstrated that the discrimination resulting from the Arkansas HUE tax is not only unconstitutional but also entirely unnecessary given the availability of feasible alternatives. Mileage-based levies, such as a fuel tax, have long existed and are employed in every state. Fuel taxes in particular—

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[3] Under the IRP, the Arkansas registration fee is computed as the product of

$$\text{(annual Arkansas registration fee of \$1044)} \times \frac{\text{(in-state miles)}}{\text{(total miles)}}.$$

The registration fee per mile traveled in Arkansas is that product divided by the number of in-state miles, so that the in-state miles in the numerator and denominator cancel each other out and leave simply the annual Arkansas registration fee divided by the total miles in all states combined. For example, under the IRP, a truck that travels 2900 miles in Arkansas out of a total of 70,000 miles nationwide would pay an Arkansas registration fee per mile of:

$$\$1044 \times \frac{2900}{70{,}000} \times \frac{1}{2900} = 1.5¢/\text{mile}.$$

By contrast, a truck that travels the same number of miles in all states combined, but drives 19,000 miles in Arkansas, would pay an Arkansas registration fee per mile of:

$$\$1044 \times \frac{19{,}000}{70{,}000} \times \frac{1}{19{,}000} = 1.5¢/\text{mile}.$$

Thus, the Arkansas registration fee per mile will be the same for all IRP trucks driving the same number of miles in all states combined, regardless of their respective miles in Arkansas (see PX 56).

which are directly related to the weight, distance traveled, and wear and tear attributable to each truck, see *American Trucking Associations, Inc. v. O'Neill*, 522 F.Supp. 49, 56 (D. Conn. 1981)—are fully adequate to enable a state to exact fair and non-discriminatory reimbursement from in-state and out-of-state carriers alike for the wear and tear they cause to the state's roads.

Respectfully submitted.

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